SUPREME COURT, U. S.
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Supreme Court of the United States

No. 74-226

October Term, 1974

MICHAEL KENSINGER,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
Cleveland, Ohio 44113
Counsel for Appellant

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

No. .....

October Term, 1974

MICHAEL KENSINGER,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant, Michael Kensinger, appeals from the orders of the Supreme Court of Ohio entered May 10, 1974, reconsideration denied June 6, 1974, which dismissed his appeal from the Court of Appeals for Hamilton County, Ohio (First Appellate District) for the reason that no substantial constitutional question was presented. The Court of Appeals for Hamilton County upheld the constitutionality of Ohio Revised Code Sections 2905.34 and 2905.35. The Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial constitutional question is presented.

OPINIONS BELOW

The orders of the Supreme Court of Ohio are attached as Appendix "A". The opinion of the Court of Appeals is unreported but reproduced and attached as Appendix "B", together with its opinion in the companion case of *State of Ohio v. Queen City News, Inc., et al.*, which opinion is referred to by the Court of Appeals in *Kensinger*.

JURISDICTION

Appellant was found guilty on October 21, 1972 in the Court of Common Pleas of Hamilton County of two (2) counts, of possession of obscene materials with intent to distribute the materials in violation of Ohio Revised Code Sections 2905.34 and 2905.35. The Court of Appeals of Hamilton County entered its judgment affirming the convictions on January 14, 1974. On May 10, 1974 the Supreme Court of Ohio dismissed the appeal taken by the appellant to that court and denied his motion for reconsideration on June 6, 1974. Appellant filed his Notice of Appeal to this Court in the Court of Appeals of Hamilton County, the court possessed of the record, on August 23, 1974. A copy of Notice of Appeal is attached as Appendix "C".

The jurisdiction of this Court to review the decisions by appeal is based on Title 28 U.S. Code, Section 1257(2) in that this case draws in question the validity of statutes of the State of Ohio on the grounds of their being repugnant to the Constitution of the United States, and the decision below was in favor of their validity. Further, appellant properly invokes the jurisdiction of this Court to review other denials of his constitutional rights as if on writ of *certiorari*. *See Flournoy v. Weiner*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

STATUTES INVOLVED

The statutory provisions under which appellant was convicted, Sections 2905.34 and 2905.35, were repealed, and newly enacted Sections 2907.01 and 2907.32, became effective January 1, 1974. However, the statutory language of the former sections that formed the basis for appellant's challenges to the constitutional validity of said sections was incorporated virtually unchanged in the new enactments. Thus, appellant's challenges to the constitutional validity of Sections 2905.34 and 2905.35 are applicable and relevant to, and have not been mooted by, the newly enacted statutory provisions. Copies of former Sections 2905.34 and 2905.35 and current Sections 2907.01 and 2907.32 are attached as Appendix "D".

QUESTIONS PRESENTED

1. Whether Ohio Revised Code Sections 2905.34 and 2905.35, the statutes under which appellant was charged, tried and convicted, are void for overbreadth or vagueness.

2. Whether the arrest for distribution of materials to which First Amendment protection is claimed is unconstitutional in absence of a prior judicial determination of the obscenity of such materials.

3. Whether materials "purchased" by a police officer without a prior judicial determination of their obscenity is an illegal seizure.

4. Whether the materials forming the basis for each of the two (2) counts upon which the appellant's convictions rest are constitutionally protected expression.

5. Whether the prosecution failed to prove the essential elements of its case in failing to establish that the appellant possessed guilty knowledge and guilty purpose.

6. Whether the trial court erroneously charged the jury in defining the elements of the crime charged by defining "average person" in the community to include, *inter alia*, the "young" and "children".

7. Whether the one-on-one, pre-trial identification of appellant, conducted after appellant was indicted but in the absence of counsel, and conducted without a line-up notwithstanding the absence of any law enforcement emergency, violated due process of law.

STATEMENT OF THE CASE

On October 21, 1972, defendant-appellant, Michael Kensinger was convicted by a jury in the Hamilton County Court of Common Pleas, of violating Ohio Revised Code Section 2905.35 which prohibits, *inter alia*, the possession of obscene materials, as defined in Ohio Revised Code Section 2905.34, with intent to sell or distribute them.

On January 19, 1972, James Simon, an undercover agent of the Cincinnati Police Department, acting pursuant to specific instructions received from his superior, entered the book store located at 134 West 7th Street, Hamilton County (R. 292-294, 297),[1] and purchased books that Simon in his sole discretion, considered to be obscene (R. 294, 307, 308, 309, 313, 354).

After entering the store, Simon became engaged in conversation with an unidentified man sitting behind a cash register positioned upon a platform (R. 295, 315, 333, 346). Soon thereafter, the man indicated that if Simon was "looking for something good", Simon should read two

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1. "R. ....." refers to pages of the state trial Court proceedings.

books the man was removing from an enclosed cabinet (R. 295, 315, 347).

After reading some captions and scanning the two books (R. 295-296, 306, 361, 367, 371, 378, 380, 390, 391), entitled respectively, *Perversions,* and *Obscene: A New Definition for the Now Generation,* Simon determined the dominant theme concerned sexual perversion (R. 367), and purchased the two books (R. 296, 349, 350). No arrest then occurred (R. 307).

Later the same day the grand jury returned two "John Doe" indictments (R. 308, 309, 312); the indictments named the two books at issue in the instant prosecution (R. 714, 715). A few days later, Officers Simon and Mulligan returned to the book store (R. 304, 306, 307, 312, 451). Upon entering, Simon saw the appellant, who was at the time the only person behind the store counter (R. 330), and identified the appellant as the person who had previously sold him the books (R. 439, 448). Simon identified the appellant in the absence of a lineup (R. 329), *Miranda* warnings (R. 343), or law enforcement emergency, and in the absence of appellant's counsel or waiver of counsel.

At trial, agent Simon related the circumstances surrounding the purchase of the two books, and over defense objection (R. 334-336), to his subsequent pre-trial, out-of-court identification of the appellant. Simon also, over defense objection, made an in-court identification of the appellant.

At the close of the prosecution's case, defense counsel moved to dismiss the charges for failure of proof. The trial court denied counsel's motion (R. 460, 475, 547, 549).

The defense presented the testimony of an expert witness to establish that the materials at issue were not ob-

scene (R. 571, 587, 558, 582, 585, 565, 591, 600, 594, 603, 599).

At the close of appellant's case, counsel renewed his prior motions for dismissal of the charges (R. 665) on grounds including the constitutional infirmity of the statutes involved (R. 665), and the illegality of the arrest and of the seizure of the books in the absence of a prior determination of their obscenity (R. 461). Counsel further moved for dismissal on the grounds that each of the two books are protected as a matter of law (R. 457, 670); and that the state had failed to prove its case (R. 666, 668, 671).

The court then charged the jury (R. 713). The court, *inter alia*, read to the jury segments of Ohio Revised Code Sections 2905.35 and 2905.34 (R. 718-719). In its charge, the court included children in its definition of the average man in the contemporary community (R. 723). Defense counsel took exception to the court's instructions (R. 656-657, 652, 734).

The jury returned a verdict of guilty on both counts (R. 746-747). The court sentenced the appellant to two years probation, and a fine of $250 in each case plus court costs (R. 753).

In its assignments of error to the Court of Appeals, appellant urged the unconstitutionality of Ohio Revised Code Sections 2905.34 and 2905.35, that the publications were constitutionally-protected expression, that the trial court erred in its charge to the jury on the elements of obscenity and the issue of *scienter*, that an arrest for the distribution, or a seizure, even if by "purchase", of materials to which First Amendment protection is claimed requires a prior judicial determination of their obscenity. The Court

of Appeals, Hamilton County, Ohio, affirmed the convictions.

In support of his seeking leave to appeal to the Supreme Court of Ohio, appellant filed his memorandum in support of jurisdiction. Appellant therein presented, *inter alia*, the issues raised in the appellate court and further argued, as he had done in the trial court, that the one-on-one, pre-trial, out-of-court identification of appellant violated due process of law. On May 10, 1974 the Supreme Court of Ohio denied appellant leave to appeal on the ground that no substantial constitutional question was presented. Appellant filed his motion for reconsideration on May 17 and on June 6, 1974, the Court affirmed its decision.

THE QUESTIONS ARE SUBSTANTIAL

I. OHIO REVISED CODE SECTIONS 2905.34 AND 2905.35 ARE UNCONSTITUTIONAL

Ohio Revised Code Section 2905.35 (compare successor Section 2907.32) upon which the convictions of appellant rest prohibits, *inter alia*, the sale of obscene materials, and relies upon Section 2905.34 for definitions of statutory terms, including its statutory definition of obscene material. It is therefore readily apparent that if the definition section is subject to successful constitutional attack, the entire statutory scheme, including the statutory authority for the proceedings below, must fall.

Nor is the substantial nature of the instant challenge to Ohio's "obscenity" laws lessened because of the Ohio legislature's "revision" of such laws subsequent to appellant's trial. (See Sections 2907.32 and 2907.01.) For, although the Ohio laws have been amended subsequent to

appellant's trial, and respective provisions renumbered, the context of the law forming the bases of the within appeal remains virtually unchanged.

Section 2905.34 defines as obscene, material to which "When considered as a whole and judged with reference to ordinary adults, any of [four enumerated criteria] apply." (Compare Section 2907.01(F), which sets forth five enumerated criteria.) Listing these criteria, the statute notes that the material is obscene if "*its dominant appeal is to prurient interest,*" *id.*, Section (A)(1) (see Section 2907.01 (F)(1)), *its dominant tendency is to arouse lust* either by "depicting nudity, sexual excitement or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite," *id.*, Section (A)(2) (see Section 2907.01 (F)(2)), or by "depicting bestiality or extreme or bizarre violence, cruelty or brutality", *id.*, Section (A)(3) (see Section 2907.01(F)(3)), or where the "cumulative effect" of a series of displays of any of the foregoing is "*a dominant tendency to appeal to prurient interest,* when the appeal to such interest is primarily for its own sake or for commercial exploitation. . .," *id.*, Section (A)(4) (compare Section 2907.01(F)(5)).[2]

The statute defines "nudity" as the representation of "human male or female genitals, pubic area or buttocks" or a female breast "below the top of the nipple" with less than a full opaque covering, or "covered male genitals in a discernibly turgid state." *Id.*, Section (B) (see Section 2907.01(H)). It defines "sexual conduct" as "masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact

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2. Section 2907.01(F)(4) sets forth as a fifth alternative criteria, the depiction of "human bodily functions of elimination" if the dominant tendency of the material "is to appeal to scatological interests".

with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast." *Id.*, Section (D). (Compare Section 2907.01(C) defining sexual activity to mean "sexual conduct" or "sexual contact" or both; and Section 2907.01(B) defining sexual contact to mean "any touching of an erogenous zone of another", including, *inter alia*, "the thigh" and "buttock".)

Thus, by its express language, the statute reaches and prohibits portrayal of the "nudity" of a fully clothed male and the "sexual conduct" of physical contact with the fully clothed female breast or buttock in any publication, picture or film, provided the requisite dominant prurient appeal is shown.

Appellant contends that Section 2905.34 is, on its face, constitutionally infirm for (A) overbreadth and (B) vagueness, in violation of the First and Fourteenth Amendments to the United States Constitution, and that the convictions below based upon the definitions contained in that section are, for that reason, vulnerable to constitutional attack as well.

A. The Statute Is Void for Overbreadth.

Governmental legislative regulation of activity affecting First Amendment rights may not be accomplished "by means which sweep unnecessarily broadly." *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307 (1964). *Cf. N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Nor need one who attacks legislation for overbreadth demonstrate that his own conduct could not have been regulated by a law drawn with appropriately narrow specificity. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963); *Gooding v. Wilson*, 405 U.S. 518, 520-522 (1972).

Section 2905.34(A) prohibits *nudity* and/or sexual conduct if its dominant appeal is to prurient interest or its dominant tendency is to arouse lust. However, the Supreme Court has recently affirmed that publications containing nothing but nudes, whose dominant appeal is unmistakably prurient and lustful, are constitutionally protected. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750, 2755 (1974). *Cf. Austin v. Kentucky,* 386 U.S. 767 (1967); *Sheperd v. New York,* 388 U.S. 444 (1967).

Moreover, the statutory definition sweeps far more broadly than permitted. Ohio Revised Code Section 2905.34 contains no reference to the constitutional requirement that the material be patently offensive before it may be prohibited. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750, 2755 (1974). The statute contains an inaccurate reference to the requirement that the material, *taken as a whole,* appeal to a prurient interest, and contains an inaccurate reference to the requirement that the material lack the requisite value (the only reference to a lack of "value" appears in only *one* of the four alternative criteria upon which a conviction may rest, and the reference fails to exclude from the materials defined as obscene, works of serious literary or political value. *Miller v. California,* 413 U.S. 15 (1973)).

Consistent with the admonition in *Miller v. California,* 413 U.S. 15 (1973), that "State statutes designed to regulate obscenity must be carefully limited", the statutes here involved must be struck down as constitutionally infirm for overbreadth.

The Ohio Supreme Court's decision in *State ex rel. Keating v. "Vixen",* 27 Ohio St. 2d 278 (1971) demonstrates and underscores the constitutional invalidity of Ohio's obscenity laws. For in *"Vixen"* the Ohio Supreme Court construed Ohio's "obscenity" statutes to prohibit the pre-

sentation of a motion picture which contains a "series of displays . . . of . . . sexual intercourse . . . the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is . . . for commercial exploitation. . ." *Id.* at 284-285. Ohio's obscenity laws as construed in *"Vixen"* fail to require that the material be patently offensive; fail to require proof that the materials lack the requisite value; and contain an inaccurate reference to the requirement that the material *taken as a whole,* appeal to a prurient interest. Thus, as so construed, Ohio's obscenity laws suffer more constitutional infirmities than if the statutes alone are reviewed in the absence of the *"Vixen"* decision.

The defendants in *"Vixen"* sought review of their convictions by this Court, and this Court vacated the decision of the Ohio Supreme Court and remanded the matter to the state court for reconsideration in light of this Court's holdings in *Miller v. California,* 413 U.S. 15 (1973) and companion cases. *State ex rel. Keating v. "Vixen",* 413 U.S. 905 (1973). Upon such reconsideration, the Ohio Supreme Court quoted from its initial *"Vixen"* decision, and then concluded, without stating its reasons, that Ohio's obscenity law, as construed by the Ohio Supreme Court initially in *"Vixen",* meets with the standards for determining obscenity enunciated in *Miller. State ex rel. Keating v. "Vixen",* 35 Ohio St. 2d 215, 219 (1973). The state court's conclusion was erroneous.

Quite apart from the constitutional invalidity of Ohio's obscenity law even as construed by the Ohio Supreme Court, appellant denies the validity of the attempt by the Ohio Supreme Court to construe the instant law. For, although a court may supply a definition of obscenity where the statute is silent as to its meaning, a court may not undertake to supplant a definition of obscenity where the stat-

ute undertook to define obscenity in very specific and detailed terms. See, e.g., *Grove Press, Inc. v. Flask,* 326 F.Supp. 574 (N.D. Ohio 1970), *vacated and remanded on other grounds,* 413 U.S. 902 (1973). *Cf. State v. Shreveport News Agency, Inc.,* ..... La. ....., 14 Cr.L. 2273, 2274 (S. Ct. La. 12-3-73). Nor does this Court's decision in *Hamling v. United States,* ..... U.S. ....., 94 S. Ct. 2887 (1974) compel a contrary result. For, the judicial construction sanctioned in *Hamling* was with reference to an enactment which defined the prohibited conduct in only *generic terms*: "obscene, lewd, lascivious, or filthy [publications]". *Id.* at 2905, 2906.

The ability of the Ohio Supreme Court to construe a definitive statute, and, even assuming such ability, the validity of the determination that as construed the Ohio obscenity law comports with *Miller,* are unsettled questions arising under the Constitution compelling this Court's review.

B. The Statute Is Void for Vagueness.

Quite apart from the broad sweep of the statutes, appellants contend that its language is so imprecise, "so vague, the language so loose, as to leave to those who have to apply it too wide discretion", *Kingsley Int'l Pictures Corp. v. Regents,* 360 U.S. 684, 694 (1959). A statute that fails to give fair notice of what conduct is forbidden or that encourages arbitrary and erratic arrests is void for vagueness. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

The instant statute is replete with ambiguities and moral judgments which compound the vice of vagueness. E.g., "tendency to arouse lust", Sections (A)(2) and (A)(3) (see Section 2907.01(F)(2) and (F)(3)) "in a way which tends to represent human beings as mere objects of

sexual appetite", Section (A)(2) (see Section 2907.01(F)(2)), "extreme or bizarre violence, cruelty or brutality", Sections (A)(3) and (A)(4) (see Section 2907.01(F)(3) and (F)(5)), appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose", Section (A)(4) (see Section 2907.01(F)(5)).

Acknowledging "the inherent dangers of undertaking to regulate any form of expression", the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), warned that "state statutes designed to regulate obscene materials must be carefully limited." Works which depict or describe sexual conduct may be prohibited only if that conduct is *"specifically defined"* by the applicable state law, as written or authoritatively construed. (Emphasis supplied.) *Cf. Rabe v. Washington*, 405 U.S. 313 (1972).

II. ARREST FOR DISTRIBUTION OF MATERIALS TO WHICH FIRST AMENDMENT PROTECTION IS CLAIMED IS UNCONSTITUTIONAL IN ABSENCE OF PRIOR JUDICIAL DETERMINATION OF OBSCENITY OF MATERIAL

The Fourth Amendment protects people against unreasonable seizures of their persons as well as of their papers and effects. But a halt to the orderly distribution of materials as to which First Amendment protection is claimed is permissible only if preceded by a *judicial* determination of the obscenity of the material. *Roaden v. Kentucky*, 413 U.S. 496 (1973).

Though *Roaden* involved the seizure of a film, the Fourth Amendment prohibitions with respect to the right of expression are equally applicable to the seizure of a person. For fear of arrest, detention and imprisonment

for distributing allegedly obscene material is as much a prior restraint upon the dissemination of ideas as is a seizure of the material itself. *See City News Center Inc. v. Carson,* 310 F. Supp. 1018 (M.D. Fla. 1969) (facts reported at 298 F. Supp. 706); *Goodwin v. Morris,* 318 F. Supp. 1325 (N.D. Ohio 1970); *Delta Books Distributors v. Cronvich,* 304 F. Supp. 662 (E.D. La. 1969), *vacated other grounds* 401 U.S. 82 (1971).

In the instant case, a police officer purchased two books and submitted them to the grand jury, which returned an indictment against the seller of the books. Thereafter the appellant was arrested without any prior scrutiny of the books by a judge. Inasmuch as a judicial determination of obscenity is required, appellant contends that a determination of obscenity by one not a judge, whether it be a policeman engaged in ferreting out crime, *see Johnson v. United States,* 333 U.S. 10, 14 (1948), or a grand juror who, like a prosecutor, is engaged primarily in the investigating and bringing of criminal charges and is not held to observe the rules of law designed to ensure a fair verdict on the merits, *see Costello v. United States,* 350 U.S. 359 (1956), is constitutionally infirm. *See Roaden v. Kentucky, supra.*

III. OFFICER'S "PURCHASE" OF MATERIALS IS A SEIZURE AND ABSENT A PRIOR JUDICIAL DETERMINATION OF THEIR OBSCENITY COMPELS THEIR SUPPRESSION AS EVIDENCE

Seizure by a police officer of materials to which First Amendment protection may be claimed, without a prior determination by a judicial officer on the question of obscenity, and without the authority of a constitutionally

sufficient warrant, is unreasonable under Fourth Amendment standards. *Roaden v. Kentucky*, 413 U.S. 496 (1973).

In the instant case, an undercover agent acted pursuant to the specific instructions of his superior in "purchasing" the two books named in the indictment. The agent's actions were in furtherance of a planned governmental investigation to support criminal prosecutions. The use of governmental dollars rather than a policeman's badge does not make the taking any less of a seizure. Fourth Amendment guarantees against unreasonable seizures cannot be bottomed upon the extent of governmental coffers. Thus, the Ohio Supreme Court in *State v. Blair*, 35 Ohio St. 2d 223 (1973), upon determining that a suppression of materials as evidence was compelled, citing *Roaden v. Kentucky, supra*, reversed convictions grounded upon materials that had been *purchased* as well as these that been otherwise seized. See *State v. Blair*, 32 Ohio St. 2d 237, 244 (1972). *Cf. City News Center, Inc. v. Carson*, 310 F. Supp. 1018 (M.D. Fla. 1970); *Delta Books Distributors v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969), *vacated other grounds*, 401 U.S. 82 (1971).

IV. THE MATERIALS ARE CONSTITUTIONALLY PROTECTED EXPRESSION

In *State ex rel. Keating v. "Vixen"*, 27 Ohio St. 2d 278 (1971), *reversed and remanded* 413 U.S. 905 (1973), *on remand* 35 Ohio St. 2d 215 (1973), the Ohio Supreme Court has approved the exhibition of an otherwise "obscene" film if portions depicting actual or purported acts of sexual intercourse are deleted. Such disregard of the mandate to view material "as a whole" in determining its dominant theme, *Miller v. California*, 413 U.S. 15 (1973) is indicative of the constitutionally infirm standards employed by the

Ohio courts in determining the obscenity *vel non* of the material.

Material whose subject matter is sex and which contains scenes of nudity is not obscene for those reasons alone. *Jenkins v. Georgia* ..... U.S. ....., 94 S. Ct. 2750, 2755 (1974); *Roth v. United States,* 354 U.S. 476, 487 (1957). The instant materials do not affront contemporary community standards, and taken as a whole, do not appeal to a prurient interest in sex. Thus, the materials are constitutionally protected expression, *Miller v. California, supra,* and this Court's independent review of the materials is compelled. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750 (1974).

V. APPELLANT WAS UNLAWFULLY CONVICTED WITHOUT PROOF OF GUILTY KNOWLEDGE AND GUILTY PURPOSE

Some degree of guilty knowledge and guilty purpose are essential to a valid prosecution for distribution of obscenity. *Smith v. California,* 361 U.S. 147 (1959).

At trial, the State presented little evidence to prove that the appellant had any knowledge, actual or constructive, of the character and content of the materials for which he was convicted, or had any illegal intent as to the use of such materials. The man behind the store's counter handed Simon the two books named in the indictment, stating that Simon should read them if Simon "was looking for something good." The remark is too ambiguous to support a finding of guilty knowledge or purpose. During the direct examination of Simon, the prosecutor asked, "The books you (Simon) looked at and the books which are before you which are substantially similar in content, are similar in content?" (Tr. 350) The ambiguity of the

prosecutor's statement rendered Simon's reply, "Yes, sir", meaningless.

VI. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY IN DEFINING THE ELEMENTS OF THE CRIME

The trial court in charging the jury, identified the "average person in the community" to include "the community as a whole, *young* and old . . . men, women and children." Such instruction violated the First Amendment. *Butler v. Michigan*, 352 U.S. 380 (1957); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 489 (1957).

VII. THE ONE-ON-ONE PRE-TRIAL IDENTIFICATION OF APPELLANT VIOLATED DUE PROCESS OF LAW

Receipt into evidence of the in-court identification of the appellant by the police officer who identified appellant at a pre-trial confrontation was constitutional error. *First*, the officer identified the appellant in the absence of appellant's counsel, after the grand jury returned an indictment. *Kirby v. Illinois*, 406 U.S. 682 (1972); *United States ex rel. Robinson v. Zelker*, 368 F.2d 159 (2nd Cir. 1972), *cert. den.*, 413 U.S. 939. *Second*, the absence of any law enforcement emergency for conducting the pre-trial identification in the absence of a line-up and counsel, rendered the identification unnecessarily suggestive. *Neil v. Biggers*, 409 U.S. 188 (1972); *Smith v. Coiner*, 473 F.2d 877 (4th Cir. 1973), *cert. den.*, 94 S. Ct. 848. The failure of the State to prove that the in-court identification of the appellant was independent of the improper pre-trial identifica-

tion, rendered receipt in evidence of the in-court identification constitutional error. *United States v. Wade,* 388 U.S. 218 (1967).

CONCLUSION

This Court has exercised and continues to exercise its jurisdiction in cases involving state laws affecting First Amendment rights. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750 (1974) (probable jurisdiction noted at 94 S. Ct. 718); *Miller v. California,* 413 U.S. 15 (1973); *see also Roth v. United States,* 77 S. Ct. 854 (1957) (review on writ of *certiorari*). Thus, the Court has always regarded such cases as presenting substantial constitutional questions.

The constitutional validity of the Ohio obscenity law, Sections 2905.34 and 2905.35, is currently before this Court on a petition for writ of *certiorari, State ex rel. Sensenbrenner v. Adult Book Store,* 35 Ohio St. 2d 220 (1973), *petition for cert. filed,* 43 U.S.L.W. 3037, 3049 (U.S. Dec. 24, 1973) (No. 73-982).

In the instant appeal, appellant contends, *inter alia,* that the relevant Ohio statute is on its face, and as applied, constitutionally infirm in violation of the First and Fourteenth Amendments.

Not only does appellant challenge the validity of the determination of the Ohio Supreme Court that the Ohio obscenity law as construed comports with *Miller,* but appellant further challenges the ability of the Ohio Supreme Court to attempt a judicial rewriting of a definitive stat-

ute. The decisions of the highest courts of several states are in conflict as to whether state statutes can be judicially rescued by a substantial rewriting as undertaken by the Ohio Supreme Court. *State ex rel. Keating v. "Vixen"*, 35 Ohio St. 2d 215 (1973). *Cf.*, e.g., *State v. Shreveport News Agency, Inc.*, ... La. ....., 287 So. 2d 464, 14 Cr.L. 2273 (1973) (statute struck down); *Stroud v. State*, ... Ind. ....., 300 N.E.2d 100, 13 Cr.L. 2541 (1973) (statute struck down); *Commonwealth v. Horton*, ... Mass. ....., 15 Cr.L. 2184 (4-23-74) (statute struck down); *Rhodes v. State*, ... Fla. ....., 283 So. 2d 351, 14 Cr.L. 2081 (1973) (statute upheld); *Gibbs v. State*, ... Ark. ....., 14 Cr.L. 2450 (2-4-74) (statute upheld); *Art Theatre Guild, Inc. v. State*, ... Tenn. ....., 14 Cr.L. 2498 (2-19-74) (statute struck down); *State v. Welke*, ... Minn. ....., 14 Cr.L. 2498 (3-1-74) (statute upheld); *Chobot v. Circuit Court*, ... Wis. ....., 14 Cr.L. 2323 (12-10-73) (statute upheld); *State v. J-R Distributors, Inc.*, 14 Cr.L. 2006 (7-27-73) (statute upheld).

Appellant also urges that the instant state court decisions are violative of well-established constitutional principles in the areas of the law of search and seizure; proof of *scienter* as an element of the crime charged; determinations of obscenity *vel non* of specific materials; jury instructions in obscenity cases; and pre-trial procedures of identification of the accused.

The issues involved and herein presented are substantial and require plenary consideration for their resolution.

Respectfully submitted,

BERNARD A. BERKMAN
HAROLD L. LEVEY
Counsel for Appellant

APPENDIX A

Orders of the Supreme Court of Ohio

No. 74-219

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

MICHAEL KENSINGER,
Appellant.

ORDER ON APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY (May 10, 1974)

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

(Duly certified)

ORDER OF THE SUPREME COURT OF OHIO ON MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY (May 10, 1974)

(Caption as above)

It is ordered by the Court that this motion be overruled.

ORDER OF THE SUPREME COURT OF OHIO ON REHEARING (June 6, 1974)

(Caption as above)

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE SUPREME COURT OF OHIO ON MOTION TO STAY EXECUTION (June 20, 1974)

(Caption as above)

Upon consideration of the motion, filed by counsel for Appellant, to stay execution pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that this motion be sustained and execution of judgment is hereby stayed for a period of twenty (20) days from this date to enable counsel for Appellant to apply to The Supreme Court of the United States for an indefinite stay.

/s/ C. WILLIAM O'NEIL
Chief Justice

APPENDIX B

Opinion of the Court of Appeals for Hamilton County, Ohio

(January 14, 1974)

No. C-73008

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MICHAEL KENSINGER,
Defendant-Appellant.

DECISION

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of proceedings, the assignments of error, briefs and arguments of counsel.

Appellant presents by way of brief and supplement thereto, ten assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of defendant-appellant under Section 2905.35, Ohio Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material. These assignments of error will be considered below in the order raised by appellant.

I.

Appellant asserts a denial of rights under the First and Fourteenth Amendments of the Constitution of the United States, an unlawful arrest, and an unconstitutional prior restraint on protected materials, where there was no antecedent "judicially supervised adversary hearing" before the arrest and trial of appellant on the issue of the claimed obscenity of certain publications.

The publications in question, "Obscene! A New Definition For The Now-Generation" and "Perversions" were purchased by an officer of the Cincinnati Police Department, in plain clothes, in an adult bookstore on Seventh Street in downtown Cincinnati. The two publications were offered for sale to the officer by appellant, who was working behind the raised stand or counter inside the store, and who, after some conversation with the officer while the latter perused the publications on the rack, stated to the officer: "If you are looking for something good, look at these", handing him the two publications in question and breaking the plastic seal on them as he did so. The officer, after looking at the publications, tendered the purchase price to appellant, who accepted it. The officer then took his purchases out of the bookstore and, in due course, to the grand jury, which thereupon returned its indictment against "John Doe", subsequently identified as appellant.

This Court has had occasion previously to examine and to reject, under circumstances resembling the foregoing, the asserted necessity for an antecedent adversary hearing. *State v. Cornett*, 32 Ohio App. 2d 211. We find nothing in the law since the release of that opinion to require us to change our conclusion expressed there, that no constitutional, statutory, or other inhibition or prohibition exists to frustrate or taint the procedure followed

in this case. It may be noted that, like *Cornett,* supra, and unlike *Heller v. New York,* 93 S. Ct. 2789, *Roaden v. Kentucky,* 93 S. Ct. 2796, and other authorities cited by appellant, no Fourth Amendment involvement in search and seizure arises in this case. The material was offered to an officer lawfully on the premises as a business invitee, was accordingly purchased by him and thereafter removed by him with the consent of the owner's agent. Nothing was "seized" in a sense requiring a search warrant, or an adversary judicial determination to protect fragile First and Fourteenth Amendment rights. The reasons impelling a prior adversary hearing in cases involving the seizure for destruction or other such purpose of presumptively constitutionally protected materials, as summarized in the *Heller* and *Roaden* cases, are simply not, in our view, present here. Accordingly, appellant's first assignment of error is overruled.

II.

Appellant's second assignment of error asserts error in the admission of the two publications into evidence without contemporaneous testimony and evidence bearing on the issue of the obscenity of the publications. Thus, argues appellant, the State may not rely solely upon the publications themselves to demonstrate their own obscenity, but must accompany such exhibits with independent testimony relating such publications to the specific obscenity tests or standards then applicable.

We do not so understand the law. As stated in the majority opinion in *Paris Adult Theater I v. Slaton,* 93 S. Ct. 2628:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed

in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the questions."

Appellant's second assignment of error is without merit.

III.

Next, appellant asserts that the statutes under which appellant was indicted, tried and convicted, Revised Code Sections 2905.34 and 2905.35, construed in pari materia, are facially unconstitutional and have been applied in an unconstitutional manner, in contravention of the First and Fourteenth Amendments. However, in *State, ex rel. Keating v. Film Entitled "Vixen"*, 27 Ohio St. 2d 278, the Supreme Court of Ohio considered the issue of these two enactments against the requirements of the First Amendment of the U. S. Constitution and the Ohio Constitution and found no conflict therein either "facially", nor as they were involved in that case, in a nuisance abatement action under Revised Code Section 3767.01 et seq. The court stated:

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse." (p. 283)

* * * * *

"Those two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that . . . So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print, or distribute informa-

tion or opinion.' *Schneider v. State* (1939), 308 U. S. 147, 161."

In the body of the *Vixen* decision, the court cited both *Roth v. United States*, 354 U. S. 476, and *Memoirs v. Massachusetts*, 383 U. S. 413 which, as pointed out in the dissent of Judge Corrigan, supplied the definition of obscenity required by the Supreme Court of the United States to be applied in the trial of that, as in this case. We can find no reason or authority to require us to find Revised Code Sections 2905.34 and 2905.35 facially unconstitutional. *State v. Mazes*, 7 Ohio St. 2d 136; *State v. Blair*, 32 Ohio St. 2d 237.

Nor do we find them unconstitutionally applied under the record of this case; certainly not, as appellant argues, because they "impose a standard equally applicable to juvenile and adults alike, thereby reducing the adult standard to that of a juvenile standard", since, from the statutory scheme, it may as readily be argued that the juvenile standard is *raised* to that of the adult standard. In any event, the State has been held to have a legitimate concern in both areas, and we find no reason why such concern may not be expressed in the fashion adopted by the legislature here. *Paris Adult Theater I v. Slaton*, 93 S. Ct. 2628 (slip opinion at pp. 7-8).

As to appellant's argument, raised in his Supplementary Brief, that the recent decision by the Supreme Court of the United States in *Miller v. California*, 93 S. Ct. 2607, so repudiated the former *Roth-Memoirs* obscenity test as "unworkable" and as casting a burden on the State "virtually impossible to discharge", that any conviction secured thereunder is necessarily infirm, we must disagree. We have been cited to no authority and have discovered none which would prohibit a State from enacting or re-

quiring a more *stringent* or difficult-to-prove test for obscenity than that currently deemed permissible under the First and Fourteenth Amendments. If *Miller* has now eased two of the *Memoirs* tests so that the State is no longer required to establish that the materials are "utterly without redeeming social value", but may instead show that the material "taken as a whole, does not have serious literary, artistic, political, or scientific value", and if the State is no longer required to offer evidence of nor the trial court to charge on "national standards", but where obscenity may be determined by applying "contemporary community standards" instead, we are aware of no prejudice to a defendant found guilty by a jury, under competent and probative evidence to sustain it, pursuant to a charge by the trial court requiring it to find the materials to be *utterly* without redeeming social value viewed in the context of national standards. Not, in any event, unless we are required to find that *Miller* declared the old test to be *absolutely* impossible to apply and, therefore, all convictions secured thereunder to be suspect and perhaps voidable. We find nothing in *Miller* to require this drastic view.

We may note, in passing, the remand of the above *Vixen* decision which was decided under the *Roth-Memoirs* rule, by the Supreme Court of the United States to the Supreme Court of Ohio, for consideration in the light of *Miller,* and the reaffirmance thereof by the latter, stating:

> "This court is of the opinion that the statutes applied in this cause initially by the court comport with the standards enunciated in *Miller.*"

State ex rel. Keating v. "Vixen", 35 Ohio St. 2d 215. We find, therefore, as did apparently the Supreme Court of

Ohio, no fatal conflict in a conviction secured under criminal statutes limited and applied to conform to the *Roth-Memoirs* test, where such statutes are also held subsequently to comport with the broader *Miller* test.

As to appellant's argument that the *Miller* test may not be retroactively applied to sustain the instant judgment, we defer discussion to our disposition of appellant's tenth assignment of error.

Appellant's third assignment of error is not well taken and is accordingly overruled.

IV.

In his fourth assignment of error, appellant argues that the absence from the record of any evidence on behalf of the State of "pandering", of distribution of materials to juvenile, and/or evidence or proof of any mode of distribution of materials in a manner that an unwilling adult could not avoid exposure, resulted in a failure to remove the materials from the protection of the First and Fourteenth Amendments, requiring favorable action by the trial court on various motions to strike and to dismiss appellant. This argument appears to derive from *Redrup v. New York,* 386 U. S. 773, when the court reversed several obscenity convictions from various states, pointing out in its terse opinion that none of the cases considered involved areas of control which the Supreme Court had previously held to be legitimate areas of state concern, for example, a specific and limited statutory concern for juveniles, assaults upon an individual's right of privacy by obtrusive display of offensive materials, and "pandering" in the *Ginzburg* sense. We do not read *Redrup,* however, as any indication of intent to *limit* a State's legitimate concern to the three specific areas mentioned, and to preclude all others. And, indeed, this appears to

be clearly confirmed in *Paris Adult Theater I v. Slaton*, supra, where the court rejected the argument that the films in question acquired constitutional immunity where they were exhibited solely to consenting adults, with no evidence of pandering or invasion of privacy of the non-consenting public generally. Said the court:

> ". . . this Court has never declared these to be the only legitimate state interests permitting regulations of obscene material."

Appellant's fourth assignment of error is accordingly overruled.

V.

Next, appellant argues that the trial court erred in failing to grant appellant's motion to dismiss at the conclusion of the State's case for failure to establish a prima facie case. To the extent that appellant's argument under this assignment is directed toward the alleged necessity for the introduction by the State of evidence of distribution to juveniles, invasion of privacy, or pandering, the assignment is answered by our disposition of assignment of error numbered four above. The balance of this prolix assignment of error and argument thereunder is addressed to the alleged failure of the State to adduce evidence sufficient to constitute a prima facie case, of the three elements required by the *Roth-Memoirs* cases for the proscription of obscenity, and of their coalescence therein. Since we understand the law to be that the publications are themselves the best evidence of their own character, and, where placed before the triers of the facts under proper instructions, do not require expert or other commentary or formal gloss, or testimony relating them to national contemporary community standards, we find

the balance of this assignment of error to be without merit. *Paris Adult Theater I v. Slaton,* 93 S. Ct. 2628 (slip opinion at pp. 6-7, esp. footnote 6 on p. 7).

VI.

The appellant's sixth assignment of error argues that the trial court erred in not dismissing the case at the end of appellant's case, where the State offered no evidence in chief, nor rebuttal evidence, as to the presence of the three elements required under *Roth-Memoirs* decisions, and of their coalescence therein. Since, as previously noted, the publications were themselves placed in evidence and were before the jury to consider, for the reasons noted in our disposition of assignment of error numbered five above, we find no error in the failure of the trial court to dismiss this cause at the conclusion of appellant's case. Accordingly, appellant's sixth assignment of error is overruled.

VII.

Appellant's seventh assignment of error addresses itself to alleged error in the trial court's charge to the jury, namely, in refusing to give certain charges specifically requested, in erroneously charging on national community standards, on the elements of obscenity and scienter, and in refusing to respond properly to a question posed by the jury. A careful reading of the charge by the trial court convinces us that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibilities and duties as triers of the facts. Those charges specially requested by appellant and refused by the trial court were denied as either subsumed in the

general charge and therefore redundant, or as otherwise improper or misleading. We find no error prejudicial to appellant in their refusal, nor in the response by the trial court to the query of the jury. As to appellant's argument, contained in his Supplemental Brief, that the *Miller* decision fatally weakens any conviction not under the *Roth-Memoirs* test, we refer to our examination of this issue in appellant's third assignment of error.

Appellant's seventh assignment of error is overruled.

VIII.

Next, appellant argues that the "systematic exclusion" of young jurors from service on juries dealing with obscenity cases violated appellant's right to an impartial jury under the Sixth and Fourteenth Amendments of the Constitution of the United States. The record reveals that the customary procedure was followed in this case, of using a 1970 poll book to draw at random a venire of potential jurors. No suggestion is made, and none is present in the record, that any legal or constitutional irregularity exists with respect to venire so selected or to the method of selecting it, *except* to the extent that it necessarily excluded those under twenty-one years of age (twenty-three years at the time of trial in 1972) not then eligible to vote and therefore not included in the 1970 poll books. We find this procedure totally unlike the purposeful and systematic exclusion of racial groups held improper in *Swain v. Alabama*, 380 U. S. 202, and have been directed to no authority which would require us to hold otherwise. Indeed, the argument advanced by appellant invites a reductio ad absurdum rejoinder: if we must constitutionally include eighteen year olds to make up an impartial jury, why not sixteen year olds, who, after all, are permitted, under certain circumstances, to marry; or fourteen year

olds who have achieved (or suffered) puberty; and if registered voters are included, why not citizens not so registered, including those imprisoned for crimes? It is obvious to us that some technically feasible method for selecting potential jurors reasonably calculated to secure and which does in fact secure a random unpremeditated sampling of citizens will, together with other protective procedures such as voir dire examination, peremptory challenges and challenges for cause, and the presence of an impartial magistrate instructing the jury on matters of law and procedure, satisfy the requirements of the Sixth and Fourteenth Amendments for an impartial jury, without the necessity of finding twelve persons precisely proportioned in age, sex, race, socio-economic status, religion, etc. to their larger counterparts in society. Appellant's eighth assignment of error is without merit.

IX.

Appellant's ninth assignment of error asserts that the verdict is against the manifest weight of the evidence and is contrary to law. We have examined the record, including the publications in question, and have concluded that there is present in the record substantial credible evidence of probative value as to each element of the offense charged. Appellant's ninth assignment of error is accordingly overruled.

X.

Finally, appellant asserts by way of his tenth assignment of error, that the constitutional test formulated by the Supreme Court of the United States, incorporated into and applied by the State in the prosecution of this case (that is, *Memoirs v. Massachusetts*, 383 U. S. 413), was "completely and totally repudiated" by the Supreme Court

in *Miller v. California*, 93 S. Ct. 2607, and that the retroactive application of the *Miller* test to sustain the instant judgment would offend the Fourteenth Amendment of the Constitution of the United States.

The point is not contested by the appellee, the State arguing that the retroactive application of *Miller* is not sought by the appellee and that the judgment against appellant should and can be sustained on the basis of existing law at the time of the convictions. This position impliedly argues that *Miller* did not so "completely and totally repudiate" the previous obscenity test *that any conviction secured thereunder* is necessarily infirm. We agree, for the reasons in our disposition of appellant's third assignment of error. Accordingly, we overrule appellant's tenth assignment of error.

It is, therefore, the order of this Court, that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

HESS, *P. J.*, SHANNON and PALMER, *J. J.*

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B (Cont'd)

Opinion of Court of Appeals in Companion Case

(January 14, 1974)

No. C-72345

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

QUEEN CITY NEWS, INC.

and

JOHN MARSHALL,
Defendants-Appellants.

DECISION

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

Appellant, Queen City News, Inc., presents by way of brief and supplement thereto, thirteen assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of appellant, Queen City News, Inc., and a jointly tried co-defendant, John Marshall, under Section 2905.35, Ohio

Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material.

Appellant, John Marshall, presents by way of brief and supplement thereto, sixteen assignments of error.

These assignments of error will be considered below first in the order raised by appellant, Queen City News, Inc., and second in the order raised by appellant, John Marshall.

We note that this Court this day has decided State of Ohio v. Michael Kensinger, case number C-73008, unreported, wherein many of the issues raised are similar to those broached by the assignments of error in the instant case. Additionally, we note that counsel for Michael Kensinger, defendant-appellant, in case number C-73008, is the same counsel representing appellant, John Marshall, herein, and the counsel for appellant, Queen City News, Inc. is his associate.

Therefore, in disposing of some of the assignments of error asserted by the appellants in this case, reference will be made to our rulings in Kensinger, infra, where the reasons therefor apply to the assignments here before us.

Assignments of Error, Queen City News, Inc.:

I.

Queen City asserts that the statute upon which the indictment was based violates the First and Fourteenth Amendments to the United States Constitution.

This assignment is not well taken for the reasons set forth in our rulings upon the third and fourth assignments of error in Kensinger, supra.

II.

This assignment overlaps the first in that the contention is that the indictment failed to charge an offense punishable within the permissible limits of the First and Fourteenth Amendments to the United States Constitution. We find it not to be well taken for the reasons set forth in the disposition of the fourth assignment of error in Kensinger, supra.

III.

Appellant alleges that the trial court erred in overruling the pretrial motion to suppress evidence obtained in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

It is argued first in support of this assignment that special First Amendment principles apply which require a prior adversary hearing before seizure.

Despite the fact that some 1400 separate items, including books, magazines, film, phonograph records and rubber goods were seized and removed from a warehouse, there is nothing to show that more than one copy of a book, magazine or other item was taken by the police officers conducting the search. There is testimony that the warehouse contained from 100,000 to 200,000 items, there being numerous copies of each publication and duplications of the rubber goods. It is undisputed that the business of appellant was not shut down nor interrupted for more than several hours.

In deciding *State v. Albini* (1972), 31 Ohio St. 2d 27, the court remarked at page 30 of the opinion:

". . . we do not read the above cited Supreme Court decisions as demanding that in every case where a

seizure of alleged obscene material is to be made, a preseizure adversary hearing is constitutionally required. Whether or not such a hearing is necessary must depend upon the nature and purpose of the seizure."

Just as in *Albini*, supra, the seizures now before us were not made for the purpose of preventing the dissemination of that which the various books, magazines, films and phonograph records contained nor preventing the sale of the rubber goods. Rather, the single samples were taken for the purpose of preserving them in order that they might be used as evidence in proceedings to determine whether their exhibitors were guilty of committing a crime.

Subsequent to the decision in *Albini*, the Supreme Court of the United States decided *Heller v. New York*, 93 S. Ct. 2789 (1973), the first headnote of which is:

"There is no absolute First or Fourteenth Amendment right to a prior adversary hearing where allegedly obscene material is seized pursuant to warrant to preserve material as evidence in a criminal prosecution."

This squares with the syllabus in *Albini*:

"Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidenced to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

Consequently, as we noted in our ruling on the first assignment of error in Kensinger, the reasons impelling a prior adversary hearing in cases involving the seizure of

presumptively constitutionally protected materials for destruction or other such purpose, as summarized in *Heller,* supra, *Roaden v. Kentucky,* 93 S. Ct. 2796, are simply not present in this case.

Appellant argues, further, that probable cause did not exist for the issuance of the search warrant; that the informant's reliability was not supported; that the facts failed to establish that a crime was being committed at the time the warrant issued, that the warrant failed to meet Fourth Amendment specificity requirements and failed to satisfy First and Fourth Amendment particularity requirements, and that the search conducted by the executing officers was a general search.

Fundamentally, it is required that the officer authorizing the search of premises be neutral and detached and that the information given him by an affiant be sufficient to enable him to make an independent judgment that probable cause exists to issue the warrant. *State v. Haynes,* (1971), 25 Ohio St. 2d 264.

The standard of reasonableness for obtaining a search warrant has been set forth in *Aguilar v. Texas,* 378 U. S. 108, and *Spinelli v. United States,* 393 U. S. 410. Where the search warrant is issued pursuant to an informer's tip, the affidavit must: (i) set forth such of the underlying circumstances as may be necessary to enable the magistrate to judge the probable validity of the informant's conclusions; and (ii) some indication of the trustworthiness of the informant.

Here, the informant was a former employee of Queen City News, Inc. who knew what materials were stored in the warehouse and who had delivered such as a route man serving customers. We believe that the "two pronged" test was met and that the affidavit is sufficiently detailed

as to meet the requirements of law. Our examination of the record leads us to conclude that the tipster's information was not stale. The affiant had observed appellant conducting business, had received information about the character of that business and had verified by personal observation that at least one visible item was a publication which, in his opinion, was obscene. Such facts, coupled with the background afforded by the informant, clearly negate appellant's protests that there was nothing before the magistrate to establish probable cause that any crime was being committed.

It is equally apparent that where, as here, only single samples of a large inventory of many types of publications and other goods are seized to be used as evidence in a proceeding to follow and where, as here, such items have been identified with sufficient specificity and particularity in the warrant to search, such search is lawful and is not a general search.

Accordingly, we find the third assignment of error not to be well taken.

IV.

In this assignment, appellant asserts that the materials upon which the indictment was based were "protected expression under the First and Fourteenth Amendments to the United States Constitution" and that the prosecution totally failed to meet its burden of proof of obscenity.

It can no longer be gainsaid that obscene material is not speech entitled to First Amendment protection. *Paris Adult Theater I v. Slaton*, 93 S. Ct. 2628; *Miller v. California*, 93 S. Ct. 2607; *United States v. Roth*, 354 U. S. 476.

In deciding *Slaton*, the court pointed out at pages six and seven of the opinion:

"Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

Then, the record before us when viewed in the light of what we understand the law to be, clearly demonstrates that this assignment of error is without merit. See, also, the rulings upon the second and fifth assignments of error in Kensinger, supra.

V.

This assignment is that the trial court erred in overruling the motion for acquittal upon the ground that the prosecution had failed to prove all of the essential elements of the offense charged.

The thrust of the argument advanced by appellant echoes that given in support of the fourth assignment.

We have examined the record, including the publications and materials in question, and are compelled to conclude that there is therein substantial credible evidence of probative value as to each element of the offense charged. Therefore, and for the reasons given above in our ruling on the fourth assignment, the fifth assignment is not well taken.

VI.

The sixth assignment reasserts the contention that the materials received into evidence are constitutionally protected. It is without merit for the reasons given in rul-

ings upon the fourth assignment herein, and in our rulings upon the fifth and sixth assignments of error in Kensinger.

VII.

This assignment is that the trial court erred in overruling appellant's objections to admission into evidence of subpoenaed documents. It is urged that the subpoena *duces tecum* of corporate records consisting of personnel and payroll records and delivery sheets was (a) illegally issued; (b) invalidly served, and (c) that the records were erroneously received into evidence.

The State first attempted to serve an alleged statutory agent, but the agency was denied by the purported agent. Then, the State dropped a subpoena through the mail slot of the warehouse premises. Lastly, the State served an employee of the corporation on the loading dock of the warehouse.

Upon instruction of the court after conference with counsel, counsel for Queen City brought the records into court, but protested their production.

Although a number of cases are cited in support of branch (a) of the argument, with none of which do we disagree, we are not persuaded that corporation records cannot be subpoenaed in a criminal case. It must be remembered that the records were not seized but were sought to be produced by valid process.

Secondly, service upon the employee, under all the circumstances disclosed by the record, was sufficient.

The contention that the documents were erroneously received raises the essential question of protection afforded the corporate and individual defendants in the case by the Fifth Amendment to the Constitution of the United States.

In *Wilson v. United States*, 221 U. S. 361, it was observed:

> ". . . [the corporation] cannot resist production [of books and papers] upon the grounds of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment . . . , it must submit its books and papers to duly constituted authority when demand is suitably made."

The Ohio Supreme Court adopted this view and quoted extensively from *Wilson*, supra, in deciding *In re Bott*, 146 Ohio St. 511 . At page 518 of the unanimous opinion in that case, we find:

> ". . . an officer of a corporation cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it."

This concept has been refreshed in *State v. Pussycat Cinex* (1973), 36 Ohio St. 2d 108, which cites *Wilson*, supra.

The privilege against self-incrimination is, then, not available to a corporation. Therefore, the seventh assignment of error is not well taken. Parenthetically, we note that this question as it pertains to the individual defendant-appellant will be discussed below.

VIII.

This assignment relates to the charge to the jury, the contention being that it violated the First and Fourteenth Amendments to the United States Constitution. Essentially, the arguments in support of this assignment parellel those advanced with reference to the seventh assign-

ment of error in Kensinger. We find this assignment not to be well taken for the reasons given in our rulings upon the third and seventh assignments of error in Kensinger. Here, as in Kensinger, the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio Revised Code, and otherwise in its general duties and prerogatives.

IX.

Here, appellant claims that the court erred in limiting voire dire examination of the jury by defense counsel.

It is argued that rights accruing under the Fourteenth Amendment were denied because the court limited efforts of counsel to "probe the attitudes of prospective jurors" regarding, inter alia, "contemporary community standards of depiction of sexual material", "shifting views of frankness" and morality in depiction of sexual subject matter, "depth of feelings regarding obscenity of depiction", and attitudes about determining the dominant theme and redeeming social value of "sexually oriented" publications.

Examination of the jury upon voir dire begins at page 196 of the transcript of the proceedings and concludes at page 610. The initial impression we received upon our examination of this part of the record is that the judge presiding exhibited patience, restraint and stamina. He permitted wide latitude to both defendants before the bar in their searching examination of prospective jurors. We find nothing to sustain their claim that the court abused its discretion or that strictures placed upon interrogation of the panel in ruling upon objections by the State prejudiced the accused.

The ninth assignment is not supported by the record and is not well taken.

X.

The tenth assignment is that the trial court erroneously denied defense counsel inspection of grand jury minutes.

The Supreme Court of Ohio recited the general rule to be applied when inspection of grand jury minutes is sought in its decision in *State v. Laskey*, 21 Ohio St. 2d 187, at page 191 of the per curiam opinion:

> "Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general."

The court referred in *Laskey* to the rule in *State v. White* (1968), 15 Ohio St. 2d 146, declaring that:

> "The *White* rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, cannot be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination."

See, also, *State v. Patterson* (1971), 28 Ohio St. 2d 181, especially syllabus three.

In this case, appellant sought inspection of the minutes to "test the foundation upon which the indictment was grounded", arguing that "there is no unequivocal evidence in the record indicating that the grand jury returned the . . . indictment . . . upon a review of the 41 respective items supportive of the counts therein contained".

Who do not discern from the record that the appellant has demonstrated the particularized needs required by the rule in *White* and *Laskey* and, consequently, are constrained to conclude that the assignment of error is not well taken.

Supplemental Assignments of Error.

XI.

Queen City urges herein that the affirmance of the conviction would violate due process and ex post facto prohibitions.

This assignment reflects the issues broached in the third and tenth assignments of error in Kensinger and is found not to be well taken for the reasons given therein.

XII.

Here, appellant claims again that the statutes under which it was charged are void for overbreadth or vagueness. It is not well taken for the reasons set forth in our ruling upon the first assignment of error herein and in the third and fourth assignments in Kensinger.

XIII.

The thirteenth assignment restates the issues raised by the third and fourth assignments of error herein and is not well taken for the reasons given therein.

Therefore, the judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, Queen City News, Inc. is affirmed.

Assignments of Error, John Marshall:

I.

In his first assignment of error, appellant, John Marshall, asserts that the search and seizure at the warehouse of Queen City News, Inc. was an unreasonable search and seizure.

While this assignment is prolix, we find that it raises the same, or very similar, issues brought before us in the third assignment of error in the appeal of Queen City News, Inc. Hence, we find this assignment of error by appellant, John Marshall, not to be well taken for the reasons given in our ruling hereinbefore on the third assignment of error of Queen City.

II.

This assignment is that the court erred in admitting publications into evidence where no evidence was presented establishing obscenity of the items.

The same question has been considered and ruled upon in Queen City's appeal with respect to the fourth and sixth assignments therein and in the appeal of Michael Kensinger with respect to the second and fifth assignments of error in that case.

Accordingly, this assignment is found to be without merit for the same reasons.

III.

The appellant asserts, here, that Sections 2905.34 and 2905.35, Ohio Revised Code, are unconstitutional and repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The same issue was raised by Queen City and Kensinger and this assignment by Marshall is held to be with-

out merit for the reasons given in our rulings on the first assignment of Queen City and the third and fourth assignments of error by Kensinger.

IV.

Here, appellant questions whether the proof by the State demonstrated that the publications were not protected against State regulation by the First and Fourteenth Amendments.

We have ruled on the same proposition in the first and second assignments of error by Queen City herein and in the third and fourth assignments in Kensinger. Therefore, the assignment of error by Marshall is not well taken for the same reasons.

V.

This assignment alleges that the prosecution failed to establish a prima facie case. It is not well taken for the reasons given above on the fourth and sixth assignments of Queen City and the second and fifth assignments in Kensinger.

VI.

Here, appellant urges that the court erred in not dismissing the cause at the conclusion of defendant's case, where the State offered no rebuttal evidence.

It is not well taken for the reasons given by us in disposing of the fifth and sixth assignments in Kensinger and the fourth and sixth assignments of Queen City herein.

VII.

The seventh assignment of error is identical in its essential thrust to the seventh assignment of error by Queen

City as it relates to the admission of the corporate records of Queen City News, Inc.

A similar assignment numbered seven has been made by Queen City and ruled upon above as it pertains to that appellant, and to the degree that our rulings therein apply to Marshall, individually they are adopted here.

When the entire transcript of the proceedings is considered, it is clear that it was never disputed that appellant, John Marshall, was connected with the operation of the business of Queen City News, Inc. He was at the warehouse when the warrant to search was executed and the seizure effected and had been there the day before. The essence of the defense was not that the accused did not possess the materials but they were not obscene and therefore protected.

We view the admission of the corporate records as being cumulative, at most, and are able to discern no ground upon which to determine that the appellant, Marshall, was prejudiced thereby, either by the records having been received in evidence or by the possibly contradictory remarks of the court to counsel. Hence, the assignment of error is without merit.

VIII.

This assignment challenges the instruction to the jury on the "national contemporary community standard", and appellant contends, inter alia, that the jury was misdirected on the issues of "dominant theme-prurient appeal" and "redeeming social value".

We find the eighth assignment of error not to be well taken for the reason that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases. For an

expansion of this fundamental reason, attention is directed to our rulings in the seventh and third assignments in Kensinger and the eighth assignment in the appeal of Queen City.

IX.

This assignment asserts that the record establishes the bias of the trial court which denied defendant's right to effective counsel and to a fair and impartial trial.

We find the assignment not to be well taken because the record, considered in its totality, fails to support the assigned error in any of its particulars.

X.

The tenth assignment by Marshall is the same in its thrust and import as the tenth assignment by Queen City based upon denial of access to grand jury minutes and is without merit for the reasons given in our ruling in Queen City's appeal.

XI.

This assignment asserts that the court prejudiced Marshall in restricting inquiry to the venire. It is without merit for the reasons given in our rulings upon the ninth assignment in the appeal by Queen City.

XII.

Here, appellant contends that the court violated his rights granted by the Fifth and Fourteenth Amendments to the Constitution of the United States by "commenting on the failure of the defendant to testify in his own behalf" during its instruction to the jury.

The court stated to the jury:

> "It is not necessary that a defendant take the witness stand in his or its own defense. He has a constitutional right not to testify. The fact that the defendant or defendants did not testify must not be considered for any purpose nor should any inference be drawn therefrom."

We believe the better practice to be for the court not to so instruct, but when the charge as a whole is considered the inclusion of the quoted language does not constitute prejudicial error.

Therefore, the assignment is not well taken.

XIII.

This assignment is, essentially, that Marshall was denied constitutional rights because the publications were not read to the jury and that since the jury "deliberated for a total of four hours and forty-six minutes" it follows necessarily that the jury could not have read and considered the materials submitted as evidence.

There is nothing in the record from which we could conclude that the jury was guilty of misconduct without indulging in improper speculation. There is nothing to demonstrate how the jury reached the verdict and it must be presumed that the result was reached in harmony with the instructions of the court and according to law. The general rule to be applied is that no judgments of conviction will be reversed unless it appears affirmatively from the record that the accused was prejudiced. We find no such affirmative demonstration and must conclude that the assignment is not well taken.

XIV.

The ground of this assignment of error has been disposed of in our ruling on the eighth assignment of error in Kensinger and the reasons there given are adopted here.

XV.

Here, Marshall asserts that the verdict is manifestly against the weight of the evidence and contrary to law.

We have examined the record, including the publications and materials in question, and have concluded that there is present in the record substantial evidence of probative value as to each element of the crime charged. Accordingly, the assignment is not well taken.

XVI. (Supplemental)

This assignment of error is that the constitutional test (*Memoirs*) has been "completely and totally repudiated" in *Miller v. California*, 93 S. Ct. 2607. It is not well taken for the reasons given in the disposition of the third and tenth assignments in Kensinger and adopted in the eleventh assignment in the appeal of Queen City.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, John Marshall, is affirmed.

HESS, *P. J.*, SHANNON and PALMER, *J. J.*

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

Court of Appeals No. 73-008
Ohio Supreme Court No. 74-219

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

-vs-

MICHAEL KENSINGER,
Defendant-Appellant.

NOTICE OF APPEAL

Notice is hereby given pursuant to Rule 10, United States Supreme Court Rules that Michael Kensinger, defendant-appellant, hereby appeals to the Supreme Court of the United States from the denial of the Supreme Court of Ohio of appellant's leave to appeal entered in this action May 10, 1974, and its denial of a motion for reconsideration June 6, 1974.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
781-5245
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the within Notice of Appeal was served upon Simon L. Leis, Hamilton County Prosecutor, 420 Hamilton County Court House, Cincinnati, Ohio 45202, counsel of record for appellee, by depositing same in a U.S. Post Office mail box, so addressed, with first class postage prepaid, this 21st day of August, 1974.

A copy of the within Notice of Appeal was mailed to the Clerk, Supreme Court of Ohio, Columbus, Ohio, this 21st day of August, 1974. All parties required to be served have been served.

/s/ BERNARD A. BERKMAN
Counsel for Appellant

APPENDIX D

Relevant Sections of the Ohio Revised Code

[Former] § 2905.34 Definitions:

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

[Former] § 2905.35 [Production or dissemination of obscene material or performances.]

No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both.

[Current] § 2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

[Current] § 2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A) (2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was dis-

seminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

FILED
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MICHAEL RODAK, JR.,

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-226

MICHAEL KENSINGER,

Appellant,

vs.

STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Appellee

BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
Cleveland, Ohio 44113

Attorneys for Appellant

COURT INDEX PRESS, INC.

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On Appeal from the Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

Now comes the State of Ohio, Appellee, by Simon L. Leis, Jr., Prosecuting Attorney of Hamilton County, Ohio, and Leonard Kirschner and Robert R. Hastings, Jr., Assistant Prosecuting Attorneys, of Hamilton County, Ohio, and respectfully moves this Court for an order dismissing the appeal for the reasons that Section 2905.34 and 2905.35, Ohio Revised Code, are not repugnant to the United States Constitution and that there has been no denial of Appellant's Constitutional rights in the proceedings below as reflected in the record of trial proceedings and the opinions and rulings of the Court of Appeals and the Supreme Court of Ohio.

OPINIONS BELOW

The brief of Appellant correctly cites the opinions and judgments below. The opinion of the Court of Appeals is unreported but is reproduced and attached herein as Appendix A, together with its opinion in the companion case of *State of Ohio* v. *Queen City News, Inc. and John Marshall,* which opinion is referred to by the Court of Appeals in *State of Ohio* v. *Kensinger.*

JURISDICTIONAL STATEMENT

The appeal of Appellant from the order of the Supreme Court of Ohio entered May 10, 1974, reconsideration denied June 6, 1974, which dismissed his appeal from the Court of Appeals for Hamilton County, Ohio (First Appellate District) for the reason that no substantial constitutional question was presented, presents the question whether the Appellant's conviction for violating Sections 2905.34 and 2905.35, Ohio Revised Code was consistent with the First, Fourth, and Fourteenth Amendments to the United States Constitution.

STATUTES INVOLVED

The statutes involved are Sections 2905.34 and 2905.35, Ohio Revised Code. Effective January 1, 1974, the statutory provisions under which Appellant was convicted (Sections 2905.34 and 2905.35) were repealed, and Sections 2907.01, 2907.32 and 2907.35, Ohio Revised Code were enacted. These statutes have not been reviewed as yet by an appellate court and therefore have no bearing on the issues before this Court. Prior to Sections 2905.34 and 2905.35 (under which appellant was convicted) being enacted Section 2905.34, Ohio Revised Code was the pri-

mary obscenity statute in Ohio. Copies of Sections 2905.34 and 2905.35 and former Section 2905.34 are attached as Appendix B.

QUESTIONS PRESENTED

The Appellant raises seven (7) questions in this appeal:

(1) Whether Ohio Revised Code Sections 2905.34 and 2905.35, the statutes under which appellant was charged, tried and convicted, are void for overbreadth or vagueness.

(2) Whether the arrest for distribution of materials to which First Amendment protection is claimed is unconstitutional in absence of a prior judicial determination of the obscenity of such materials.

(3) Whether materials "purchased" by a police officer without a prior judicial determination of their obscenity is an illegal seizure.

(4) Whether the materials forming the basis for each of the two (2) counts upon which the appellant's convictions rest are constitutionally protected expression.

(5) Whether the prosecution failed to prove the essential elements of its case in failing to establish that the appellant possessed guilty knowledge and guilty purpose.

(6) Whether the trial court erroneously charged the jury in defining the elements of the crime charged by defining "average person" in the community to include, *inter alia*, the "young" and "children".

(7) Whether the one-on-one, pre-trial identification of appellant, conducted after appellant was indicted but in the absence of counsel, and conducted without a line-up notwithstanding the absence of any law enforcement emergency, violated due process of law.

STATEMENT OF THE CASE

On January 21, 1972, the Hamilton County, Ohio, Grand Jury returned an indictment against John Doe, later identified as the Appellant, Michael Kensinger, an individual, and an unknown personal corporation, later identified as River City News, Inc., a corporation. The two counts contained in the indictment alleged the unlawful sale of obscene books, to wit: "Obscene, A New Definition For The Now Generation" and "Perversions".

The jury trial in this cause commenced on October 11, 1972 and concluded after eight days of trial on October 21, 1972. Various pretrial motions were filed and heard prior to trial, the same being overruled. During the empaneling of the jury an extensive voir dire examination of prospective jurors was conducted (R 44-251).[1]

James F. Simon, a Cincinnati policeman assigned to the Vice Control Section, testified that on January 19, 1972, he entered an adult book store located at 134 West Seventh Street, Cincinnati, Hamilton County, Ohio, called the Seventh Street News (R 293-294). At the time he entered the book store on that date he was working as an undercover agent of the Cincinnati Police Department.

During the fifteen to twenty minutes that he was in the book store Mr. Simon looked through fifteen to twenty different books (R 295) and ultimately purchased two books, to wit: "Perversions" and "Obscene, A New Definition For the Now Generation" (R 296, 297), from the Appellant who was working in the book store as a clerk on that date (R 341-342). Prior to the purchase of the two books Officer Simon engaged in conversation with the Appellant. During the course of this conversation Appellant indicated to Officer Simon that if he was interested

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[1] "R. ——" refers to pages of the state trial court proceedings.

in something that was "better" than what was on the regular racks he should look at the two books Officer Simon ultimately purchased (R 347). Officer Simon looked through the two books handed to him by Appellant and after having formed an opinion as to their content paid Appellant $13.00 for them (R 347-348).

Officer Mulligan remained outside the book store on January 19, 1972. He testified Officer Simon entered the book store without any books in his possession. When Officer Simon exited the book store he had in his possession the two books he purchased from Appellant (R 437-438). Both books were marked by both officers including a description of Appellant (R 296, 443).

Thereafter Officer Simon returned briefly to his office in the Vice Control Section where he and Officer Mulligan perused the two books (R 355, 441). Then the two officers left the Vice Control offices and went to testify before the Hamilton County, Ohio, Grand Jury (R 355). An indictment was returned two days after the purchase on January 21, 1972.

Sometime shortly after the indictment was returned Officer Simon, Officer Mulligan and a member of the Hamilton County Sheriff's Patrol returned to the book store and arrested Appellant after Officer Simon positively identified Appellant as the man who sold him the two books which were the subjects of the indictment (R 351, 349, 447-448).

Both books, marked as State's Exhibits #3 and #4 were admitted into evidence (R 475, 548). In addition, both books were read in their entirety during the presentation of Appellant's case (R 634-650).

After closing arguments and appropriate instructions to the jury, the jury retired for deliberation. On October 21, 1972, the jury returned a verdict of guilty as charged

(R 746-747). Thereafter Appellant was sentenced according to law.

In his assignments of error to the Court of Appeals, Appellant urged the unconstitutionality of Sections 2905.34 and 2905.35, Ohio Revised Code, that the publications were constitutionally protected expression, that the trial court erred in its charge to the jury on the elements of obscenity and the issue of scienter, that an arrest for the distribution, or a seizure, even if by "purchase", of materials to which First Amendment protection is claimed requires a prior judicial determination of their obscenity. The Court of Appeals, Hamilton County, Ohio affirmed the convictions.

On May 10, 1974, the Ohio Supreme Court denied Appellant leave to appeal on the ground that no substantial constitutional question was presented. Appellant filed his motion for reconsideration on May 17, 1974, and on June 6, 1974, the Court affirmed its decision.

ARGUMENT

I. OHIO REVISED CODE SECTIONS 2905.34 AND 2905.35 ARE UNCONSTITUTIONAL.

Subsequent to the conviction of the Appellant the Ohio General Assembly enacted a new criminal code which contains Sections 2907.01, 2907.32 and 2907.35 which became effective January 1, 1974. These statutory provisions replaced the statutory provisions under which Appellant was convicted, Sections 2905.34 and 2905.35, Ohio Revised Code.

Section 2905.35, Ohio Revised Code (formerly Section 2905.34, Ohio Revised Code) upon which Appellant was charged and convicted prohibits, *inter alia*, possession of obscene materials with intent to sell or distribute them. Section 2905.34, Ohio Revised Code, sets forth in detail definitions for the following:

> "As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive of the Revised Code:
>
> (A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;
>
> (2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> (4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiali-

ty, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral or artistic purpose.

(B) 'Nudity' means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

C) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) 'Sexual conduct' means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

Recently this Court denied certiorari in *Boyd* v. *Ohio*, No. 73-1339, — U.S. —, 94 S. Ct. 3230 (1974), where the predecessor to Ohio Revised Code Sections 2905.34 and 2905.35 (under which Appellant was convicted), Section 2905.34, was challenged as being unconstitutional for lacking the specificity required by *Miller* v. *California*,

413 U.S. 15 (1973). The former Section 2905.34, reviewed in *Boyd* v. *Ohio, supra,* prohibited "the sale . . . an obscene, lewd or lascivious book . . ." Clearly the definition section, Section 2905.34 (under which Appellant was convicted), is much more explicit than the former statute thereby supplying the requisite constitutional specificity.

Accordingly, Sections 2905.34 and 2905.35 are not constitutionally infirm for either overbreadth or vagueness, in violation of the First and Fourteenth Amendments to the United States Constitution.

Appellee contends that Section 2905.34, Ohio Revised Code, (under which Appellant was convicted), states with sufficient clarity what material will be considered "obscene" so as to meet the specificity required by *Miller* v. *California, supra.* Compared to the examples set forth in *Miller* as to the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way, 413 U.S., at 25-26, Section 2905.34 proscribes by specific definition patently offensive "hard core" sexual conduct of a similar nature.

This Court emphasized in *Hamling* v. *United States,* —— U.S. ——, 94 S. Ct. 2887 (1974), that:

> "The *Miller* cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks or as manuals of jury instructions." 94 S. Ct. at 2906.

In addition, the Court in *Hamling, supra,* reaffirmed its stand announced in *Miller,* 413 U.S., at 24, n. 6, that the Court's decision in *Miller* was not intended to hold all state statutes inadequate recognizing that existing statutes "as construed heretofore or hereafter, may well be adequate." 94 S. Ct. at 2905.

Since the Court's decision in *Miller* a number of courts have authoritatively construed obscenity statutes to supply the judicial gloss necessary to meet the specificity requirements of *Miller*. See: *People* v. *Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 443 (Ct. App. 1973); *Redlich* v. *Capri Cinema, Inc.*, 349 N.Y.S. 2d 697, 700 (Sup. Ct., App. Div. 1973); *United States* v. *Palladino*, 390 F. 2d 499, 501 (1st Cir. 1974); *Price* v. *Commonwealth*, 201 S.E. 2d 798 (Va. 1974); *Gibbs* v. *State*, 504 S.W. 2d 719, 724 (Ark. 1974); *State ex rel. Chobot* v. *Circuit Ct. for Milwaukee City*, 212 N.W. 2d 690, 698 (Sup. Ct. Wis. 1973); *United States* v. *Thevis*, 484 F. 2d 1149 (5th Cir. 1973); *State* v. *J-R Distribs, Inc.*, 512 P. 2d 1049, 1060 (Wash. 1973); *Rhodes* v. *State*, 283 So. 2d 351, 355-356 (Fla. 1973).

Likewise, the Ohio Supreme Court has the power to supply judicial gloss through authoritative construction regardless of the degree of specificity contained in the statute as drafted by the Ohio General Assembly.

Upon remand from this Court the Ohio Supreme Court in *State ex rel. Keating* v. *"Vixen"*, 35 Ohio St. 2d 215, 219 (1973), held that Sections 2905.34 and 2905.35 Ohio Revised Code, comport with the standards enunciated in *Miller*. In *State ex rel. Ewing* v. *"Without A Stitch"*, 37 Ohio St. 2d 95, 101 (1974), the Ohio Supreme Court reaffirmed its holding in *"Vixen"* by stating that Section 2905.34, Ohio Revised Code, is not overbroad. Appellee contends this interpretation by the Ohio Supreme Court is correct.

In *Jenkins* v. *Georgia*, — U.S. —, 94 S. Ct. 2750 (1974), this Court observed, "Nothing in the movie ("Carnal Knowledge") falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is there anything sufficiently similar to

such material to justify similar treatment . . . . There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." 94 S. Ct. at 755. Appellee respectfully submits Section 2905.34, Ohio Revised Code, does not prohibit nudity alone and therefore it is not void for unconstitutional overbreadth.

Appellee contends that Sections 2905.34 and 2905.35, Ohio Revised Code, (under which appellant was convicted), specify in detail what types of activity and material and/or performance are prohibited so as to meet constitutional muster. The authoritative construction of the subject statutes by the Ohio Supreme Court further evidences that the statutes are not overbroad or vague so as to be constitutionally defective.

II. ARREST FOR DISTRIBUTION OF MATERIALS TO WHICH FIRST AMENDMENT PROTECTION IS CLAIMED IS UNCONSTITUTIONAL IN ABSENCE OF PRIOR JUDICIAL DETERMINATION OF OBSCENITY OF MATERIAL.

Ever since this Court's pronouncements in *Roth* v. *United States*, 354 U.S. 476 (1957), it has been a well established principle of constitutional law that obscenity is not protected by the First Amendment. *Miller* v. *California*, 413 U.S. 15 (1973); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); and *United States* v. *Reidel*, 402 U.S. 351 (1972).

In *Heller* v. *New York*, 413 U.S. 483, 488 (1973), the Court stated in pertinent part as follows:

> "This court has never held, or even implied that there is an absolute First or Fourteenth right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized . . ."

There was no seizure involved in this case. Officer Simon was a business invitee who purchased the two books which ultimately became the subject of the indictment under which Appellant was found guilty.

The evidence presented to the Hamilton County, Ohio, Grand Jury in this case was sufficient for the return of an indictment. Once indicted, Appellant was lawfully arrested. Accordingly, no prior adversary hearing to determine the nature of the materials is constitutionally required.

III. OFFICER'S "PURCHASE" OF MATERIALS IS A SEIZURE AND ABSENT A PRIOR JUDICIAL DETERMINATION OF THEIR OBSCENITY COMPELS THEIR SUPPRESSION AS EVIDENCE.

The evidence in this case undeniably establishes that there was no seizure involved in this case. Officer James Simon, Cincinnati Police Department assigned to the Vice Control Section, entered the Seventh Street News book store on January 19, 1972, and purchased two books, "Perversions" and "Obscene, A New Definition For the Now Generation", for $13.00 from the Appellant who was working as a clerk in the book store at the time (R 292, 295-297, 341-342).

Appellant accepted Officer Simon's money for the two books and Officer Simon departed from the bookstore where he was met by his fellow officer, Officer Mulligan (R 437-

438). Appellant offered no objection when Officer Simon purchased the two books

Where the police purchase illegal materials it is not a seizure. Although Appellee realizes this Court is not bound by lower courts' decisions it is submitted where the issue of whether a prior adversary hearing is required when allegedly obscene materials are purchased by law enforcement officers has been raised the courts have held that no such hearing is required as there is no seizure. *State* v. *Hughes,* 508 S.W.2d 6 (Mo. Ct.App. 1974); *State* v. *Gant,* 508 S.W.2d 14 (Mo. Ct.App. 1974); *State* v. *Welke,* 216 N.W.2d 641 (Minn. Sup.Ct. 1974); *State* v. *Richardson,* 506 S.W.2d 488 (Mo. Ct.App. 1974); *People* v. *Ridens,* 51 Ill.2d 410, 282 N.E.2d 691 (1972); *Peachtree News Co., Inc.* v. *Slaton,* 226 Ga. 471, 175 S.E.2d 539 (1970); and *Cherokee News & Arcade, Inc.* v. *State,* 509 P.2d 917 (Okla. Cr. Ct.App. 1973).

Furthermore, in *Gornto* v. *McDougall,* 336 F.Supp. 1372 (S.D. Ga. 1972), the court held that "no adversary hearing prior to institution of a criminal action is necessary WHERE THERE IS A SALE RATHER THAN A SEIZURE of alleged pornographic material." (emphasis added). The District Court drew a clear distinction between sale and seizure. Appellee urges this distinction is valid and applies to the case before this Court.

As soon as Officer Simon purchased the two books they became his property, as an agent for the Cincinnati Police Department. Lacking a property interest in the books the Appellant has no standing to contest what Officer Simon did with the books subsequent to his purchase.

Under the facts of this case Appellee contends that the Fourth Amendment is not applicable in that there was no seizure. Assuming, *arguendo,* the Fourth Amendment is applicable Appellee submits Appellant's constitutional

rights were not violated in this case, and, therefore, the evidence was properly admitted into evidence.

In *Lewis* v. *United States*, 385 U.S. 206 (1966), the Court held that the Fourth Amendment was not violated when a Federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into petitioner's home where an unlawful narcotics transaction was consummated and the narcotics were thereafter introduced at petitioner's criminal trial over his objection. Appellee asserts that an analogous situation exists in the case at bar. Officer Simon was a business invitee in the bookstore where Appellant was working when Appellant sold the two books, "Perversions" and "Obscene, A New Definition For the Now Generation", to Officer Simon. The Court in *Lewis* explained at page 211:

> "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."

In the case at bar, as in *Lewis*, the only items that were "taken" were those that were voluntarily transferred to the agent upon the completion of a purchase.

Appellant has stated on page 15 of his Jurisdiction Statement to this Court that, "the Ohio Supreme Court in *State* v. *Blair*, 35 Ohio St.2d 223 (1973), upon determining that a suppression of materials as evidenced was compelled citing *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), reversed convictions grounded upon materials that had been purchased as well as those that had been otherwise seized."

A review of the facts in *State* v. *Blair*, supra, reveals that two police officers entered an adult book store in Columbus, Ohio, looked over the materials, and one officer purchased materials and the other officer took materials as

evidence. Six counts were returned against the defendant in *Blair*. Counts #1 and #3 were disposed of via *nolle prosequi*, while the defendant was found guilty of counts #2, #4, #5 and #6 (Appellee's Brief to Ohio Supreme Court #72-145, p.1). Count #2 was the only indictment that involved a purchase. Counts #4-6 all involved materials that defendant contended were seized without a warrant (Appellant's Brief to Ohio Supreme Court, #72-145, p.1). Appellant's argument in his brief urged only that #4-6 be set aside (Appellant's Brief, p.29). (All references to Briefs filed with the Ohio Supreme Court are attached herein as Appendix C.) Therefore, Appellee respectfully submits that the Ohio Supreme Court's reversal in *State* v. *Blair*, 35 Ohio St.2d 223 (1973), based on *Roaden* v. *Kentucky* 413 U.S. 496 (1973), extended only to the seized materials.

In *Heller* v. *New York*, 413 U.S. 483 (1973), this Court made it abundantly clear that the Court had never held that there is an absolute right to a prior adversary hearing where allegedly obscene material is seized.

> "This court has never held, or even implied that there is an absolute First or Fourteenth right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized . . ." *Heller* v. *New York*, 413 U.S., at 488.

In the present case there was not even a seizure. It would be absurd to hold that a prior adversary hearing is required before obscene material may be purchased by an undercover agent.

States have a legitimate interest in regulating commerce in obscene material. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57 (1973). Appellee respectfully submits that the methods employed in this prosecution did not run afoul of any constitutional prohibitions.

IV. THE MATERIALS ARE CONSTITUTIONALLY PROTECTED EXPRESSION.

Ever since this Court's decision in *Roth* v. *United States*, 354 U.S. 476 (1957), it has been an established principle of constitutional law that obscenity is not protected by the First Amendment. This proposition has been reaffirmed on several occasions by the Court. *Miller* v. *California, supra*; *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); and *United States* v. *Reidel*, 402 U.S. 351 (1972).

Appellee contends that no Ninth Amendment rights extent to the subject materials in this case. The Court in *Paris Adult Theatre I* v. *Slaten*, 413 U.S. 49 (1973), stated, "commerce in obscene material is unprotected by any constitutional doctrine of privacy."

The jury after examining all the evidence and applying the law to the facts as instructed by the trial court concluded that the two books were obscene materials. After an independent review of the books the Court of Appeals for the First Appellate District of Ohio reached the same conclusion. These books are classic examples of hard core pornography which are unprotected under the United States Constitution.

V. APPELLANT WAS UNLAWFULLY CONVICTED WITHOUT PROOF OF GUILTY KNOWLEDGE AND GUILTY PURPOSE.

The record of the state court proceedings contains sufficient credible and probative evidence to prove beyond a reasonable doubt the element of scienter. While Officer Simon was perusing some other books Appellant took two books, "Perversions" and "Obscene, A New Definition For

the Now Generation", from behind the counter (R 359) and said to Officer Simon, "if you are looking for something good, look at these" (R 315, 347). Appellant also stated to Officer Simon while he was in the book store, "we can't put these things out like they do in the streets of New York because you know how the pigs are here" (R 315, 347).

An examination of all the evidence in this case reveals that it is quite apparent the Appellant was aware of the character of the books he handed to Officer Simon. *Mishkin* v. *New York*, 383 U.S. 502, 510 (1966).

This Court commented in *Smith* v. *California*, 361 U.S. 147, at 154 (1959):

> "Eyewitness testimony of a bookseller's perusal of a book hardly be necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

Surely this observation is as valid today as it was when it was originally made. The facts lead to only one conclusion — Appellant was fully aware of the character of the books.

The statutory language, evidence, and instructions by the trial court in this case satisfy the constitutional requirements of scienter. *Hamling* v. *United States*, — U.S. —, 94 S.Ct. 2887 (1974).

VI. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY IN DEFINING THE ELEMENTS OF THE CRIME.

The trial court's general charge to the jury was competent, comprehensive and correct in stating the law with regard to the elements required to be proven by the State

in the prosecution of a crime charged under Section 2905.-35, Ohio Revised Code.

After a careful reading of the general charge of the trial court the Court of Appeals held that the jury was "adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibilities and duties as triers of fact".

Accordingly, no prejudicial error can be shown pertaining to the court's charge, taken as a whole. This Court has frequently held that "jury instructions are to be judged as a whole, rather than picking isolated phrases from them." *Boyd* v. *United States*, 271 U.S. 104, 107 (1926); *Hamling* v. *United States*, *supra*, at 2902.

VII. THE ONE-ON-ONE PRE-TRIAL IDENTIFICATION OF APPELLANT VIOLATED DUE PROCESS OF LAW.

It is respectfully submitted that appellant did not raise or preserve this claimed error in the Court of Appeals for the First Appellate District of Ohio. Failure to raise or preserve claimed error will result in the Ohio Supreme Court not considering such error. *State* v. *Lisiewski*, 20 Ohio St.2d 20, 24 (1969); *State* v. *Phillips*, 27 Ohio St.2d 294, 302 (1971). This court has held that even if the question has been properly raised in the trial court, the party may be held to have waived it by failing to preserve it on appeal. *Beck* v. *Washington*, 369 U.S. 541, 549-553 (1962); *Edelman* v. *California*, 344 U.S. 357, 358 (1953).

Even if the Court finds that Appellee's contention above is not well taken it is submitted that under the facts of this case Appellant's due process rights were not violated.

The record of the trial court proceedings reveals that: Officer Simon was in the book store fifteen to twenty minutes (R 295); he engaged in conversation with Appellant (R 344, 346-348); he wrote down the date, location and description of the individual from whom he purchased the books on State's Exhibit #2, a paper bag (R 296, 305, 443); and that he made a positive identification at the time of arrest.

Appellant was indicted on a "John Doe" indictment and arrested a few days after the indictment was returned which was on January 21, 1972. The place of the arrest was the Seventh Street News, the same location at which the purchase was consumated.

There is nothing in the record demonstrating that Officer Simon's identification at the time he was arrested would present a "substantial likelihood of irreparable misidentification", *Simmons* v. *United States,* 390 U.S. 377, 384 (1968). Quite the contrary, Officer Simon is a police officer whose performance depends on his ability to observe. At the time of the sale Officer Simon had adequate time to observe the Appellant. Officer Simon wrote down a description of the Appellant immediately after his purchase. At the time of Appellant's arrest Officer Simon positively identified the Appellant. Although the time period is not definite, the time between the sale of the books and the arrest of the Appellant is indicated to be about a week.

Taking the "totality of circumstances" the identification of the Appellant was based on Officer Simon's independent observations and proved to be reliable. *Neil* v. *Biggers,* 409 U.S. 188, 199 (1972). Even if there was some suggestability surrounding the arrest of the Appellant, which Appellee specifically denies, it does not reach the level of constitutional error.

To suggest that Appellant had the right to have counsel

present at the time Officer Simon identified Appellant when the Sheriff's deputy arrested him on an arrest warrant from a "John Doe" indictment is to stretch the decision of *Kirby* v. *Illinois*, 406 U.S. 682 (1972), clearly beyond its intended protection of constitutional rights.

CONCLUSION

It is respectfully submitted that Sections 2905.34 and 2905.35, Ohio Revised Code are not overbroad or vague; and that the trial and convictions of the Appellants was fair and consistent with the First, Fourth and Fourteenth Amendments of the United States Constitution.

For these reasons, Appellee respectfully submits that the Motion to Dismiss this appeal should be allowed and the appeal dismissed.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecutiong Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Appellee

APPENDIX A

OPINION OF THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-73008

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MICHAEL KENSINGER,
Defendant-Appellant.

DECISION

(Dated January 14, 1974)

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of proceedings, the assignments of error, briefs and arguments of counsel.

Appellant presents by way of brief and supplement thereto, ten assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of defendant-appellant under Section 2905.35, Ohio Revised Code, a misdemeanor section pro-

scribing the production or dissemination of obscene material. These assignments of error will be considered below in the order raised by appellant.

I.

Appellant asserts a denial of rights under the First and Fourteenth Amendments of the Constitution of the United States, an unlawful arrest, and an unconstitutional prior restraint on protected materials, where there was no antecedent "judicially supervised adversary hearing" before the arrest and trial of appellant on the issue of the claimed obscenity of certain publications.

The publications in question, "Obscene! A New Definition For The New-Generation" and "Perversions" were purchased by an officer of the Cincinnati Police department, in plain clothes in an adult bookstore on Seventh Street in downtown Cincinnati. The two publications were offered for sale to the officer by appellant, who was working behind the raised stand or counter inside the store, and who, after some conversation with the officer while the latter perused the publications on the rack, stated to the officer: "If you are looking for something good, look at these", handing him the two publications in question and breaking the plastic seal on them as he did so. The officer, after looking at the publications, tendered the purchase price to appellant, who accepted it. The officer then took his purchases out of the bookstore and, in due course, to the grand jury, which thereupon returned its indictment against "John Doe", subsequently identified as appellant.

This Court has had occasion previously to examine and to reject, under circumstances resembling the foregoing, the asserted necessity for an antecedent adversary hearing. *State* v. *Cornett*, 32 Ohio App. 2d 211. We find nothing in

the law since the release of that opinion to require us to change our conclusion expressed there, that no constitutional, statutory, or other inhibition or prohibition exists to frustrate or taint the procedure followed in this case. It may be noted that, like *Cornett,* supra, and unlike *Heller* v. *New York,* 93 S.Ct. 2789, *Roaden* v. *Kentucky,* 93 S.Ct. 2796, and other authorities cited by appellant, no Fourth Amendment involvement in search and seizure arises in this case. The material was offered to an officer lawfully on the premises as a business invitee, was accordingly purchased by him and thereafter removed by him with the consent of the owner's agent. Nothing was "seized" in a sense requiring a search warrant, or an adversary judicial determination to protect fragile First and Fourteenth Amendment rights. The reasons impelling a prior adversary hearing in cases involving the seizure for destruction or other such purpose of presumptively constitutionally protected materials, as summarized in the *Heller* and *Roaden* cases, are simply not, in our view, present here. Acordingly, appellant's first assignment of error is overrued.

II.

Appellant's second assignment of error asserts error in the admission of the two publications into evidence without contemporaneous testimony and evidence bearing on the issue of the obscenity of the publications. Thus, argues appellant, the State may not rely solely upon the publications themselves to demonstrate their own obscenity, but must accompany such exhibits with independent testimony relating such publications to the specific obscenity tests or standards then applicable.

We do not so understand the law. As stated in the majority opinion in *Paris Adult Treater I* v. *Slaton,* 93 S.Ct. 2628:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the questions."

Appellant's second assignment of error is without merit.

III.

Next, appellant asserts that the statutes under which appellant was indicted, tried and convicted, Revised Code Sections 2905.34 and 2905.35, construed in pari materia, are facially unconstitutional and have been applied in an unconstitutional manner, in contravention of the First and Fourteenth Amendments. However, in *State, ex rel. Keating* v. *Film Entitled "Vixen"*, 27 Ohio St. 2d 278, the Supreme Court of Ohio considered the issue of these two enactments against the requirements of the First Amendment of the U. S. Constitution and the Ohio Constitution and found no conflict therein either "facially", nor as they were involved in that case, in a nuisance abatement action under Revised Code Section 3767.01 et seq. The court stated:

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse." (p. 283).
>
> * * * * *
>
> "This two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that . . . So stated, they proscribe

> conduct which 'bears no necessary relationship to the freedom to speak, write, print, or distribute information or opinion.' *Schneider* v. *State* (1939), 308 U.S. 147, 161."

In the body of the *Vixen* decision, the court cited both *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413 which, as pointed out in the dissent of Judge Corrigan, supplied the definition of obscenity required by the Supreme Court of the United States to be applied in the trial of that, as in this, case. We can find no reason or authority to require us to find Revised Code Sections 2905.34 and 2905.35 facially unconstitutional. *State* v. *Mazes*, 7 Ohio St. 2d 136; *State* v. *Blair*, 32 Ohio St. 2d 237.

Nor do we find them unconstitutionally applied under the record of this case; certainly not, as appellant argues, because they "impose a standard equally applicable to juveniles and adults alike, thereby reducing the adult standard to that of a juvenile standard", since, from the statutory scheme, it may as readily be argued that the juvenile standard is *raised* to that of the adult standard. In any event, the State has been held to have a legitimate concern in both areas, and we find no reason why such concern may not be expressed in the fashion adopted by the legislature here. *Paris Adult Theater I* v. *Slaton*, 93 S.Ct. 2628 (slip opinion at pp. 7-8).

As to appellant's argument, raised in his Supplementary Brief, that the recent decision by the Supreme Court of the United States in *Miller* v. *California*, 93 S.Ct. 2607, so repudiated the former *Roth-Memoirs* obscenity test as "unworkable" and as casting a burden on the State "virtually impossible to discharge", that any conviction secured thereunder is necessarily infirm, we must disagree. We have been cited to no authority and have discovered none

which would prohibit a State from enacting or requiring a more *stringent* or difficult-to-prove test for obscenity than that currently deemed permissible under the First and Fourteenth Amendments. If *Miller* has now eased two of the *Memoirs* tests so that the State is no longer required to establish that the materials are "utterly without redeeming social value", but may instead show that the material "taken as a whole, does not have serious literary, artistic, political, or scientific value", and if the State is no longer required to offer evidence of nor the trial court to charge on "national standards", but where obscenity may be determined by applying "contemporary community standards" instead, we are aware of no prejudice to a defendant found guilty by a jury, under competent and probative evidence to sustain it, pursuant to a charge by the trial court requiring it to find the materials to be *utterly* without redeeming social value viewed in the context of national standards. Not, in any event, unless we are required to find that *Miller* declared the old test to be *absolutely* impossible to apply and, therefore, all convictions secured thereunder to be suspect and perhaps voidable. We find nothing in *Miller* to require this drastic view.

We may note, in passing, the remand of the above *Vixen* decision which was decided under the *Roth-Memoirs* rule, by the Supreme Court of the United States to the Supreme Court of Ohio, for consideration in the light of *Miller*, and the reaffirmance thereof by the latter, stating:

> "This court is of the opinion that the statutes applied in this cause initially by the court comport with the standards enunciated in *Miller*."

State ex rel. Keating v. *"Vixen"*, 35 Ohio St. 2d 215. We find, therefore, as did apparently the Supreme Court of

Ohio, no fatal conflict in a conviction secured under criminal statutes limited and applied to conform to the *Roth-Memoirs* test, where such statutes are also held subsequently to comport with the broader *Miller* test.

As to appellant's argument that the *Miller* test may not be retroactively applied to sustain the instant judgment, we defer discussion to our disposition of appellant's tenth assignment of error.

Appellant's third assignment of error is not well taken and is accordingly overruled.

IV.

In his fourth assignment of error, appellant argues that the absence from the record of any evidence on behalf of the State of "pandering", of distribution of materials to juveniles, and/or evidence or proof of any mode of distribution of materials in a manner that an unwilling adult could not avoid exposure, resulted in a failure to remove the materials from the protection of the First and Fourteenth Amendments, requiring favorable action by the trial court on various motions to strike and to dismiss appellant. This argument appears to derive from *Redrup* v. *New York*, 386 U.S. 773, when the court reversed several obscenity convictions from various states, pointing out in its terse opinion that none of the cases considered involved areas of control which the Supreme Court had previously held to be legitimate areas of state concern, for example, a specific and limited statutory concern for juveniles, assaults upon an individual's right of privacy by obtrusive display of offensive materials, and "pandering" in the *Ginzburg* sense. We do not read *Redrup*, however, as any indication of intent to *limit* a State's ligitimate concern to the three specific areas mentioned, and to preclude all others. And, indeed, this appears to be clearly confirmed

in *Paris Adult Theater I* v. *Slaton,* supra, where the court rejected the argument that the films in question acquired constitutional immunity where they were exhibited solely to consenting adults, with no evidence of pandering or invasion of privacy of the non-consenting public generally. Said the court:

> ". . . this Court has never declared these to be the only legitimate state interests permitting regulations of obscene material."

Appellant's fourth assignment of error is accordingly overruled.

V.

Next, appellant argues that the trial court erred in failing to grant appellant's motion to dismiss at the conclusion of the States case for failure to establish a prima facie case. To the extent that appellant's argument under this assignment is directed toward the alleged necessity for the introduction by the State of evidence of distribution to juveniles, invasion of privacy, or pandering, the assignment is answered by our disposition of assignment of error numbered four above. The balance of this prolix assignment of error and argument thereunder is addressed to the alleged failure of the State to adduce evidence sufficient to constitute a prima facie case, of the three elements required by the *Roth-Memoirs* cases for the proscription of obscenity, and of their coalescence therein. Since we understand the law to be that the publications are themselves the best evidence of their own character, and, where placed before the triers of the facts under proper instructions, do not require expert or other commentary or formal gloss, or testimony relating them to national contemporary community standards, we find the balance of this assign-

ment of error to be without merit. *Paris Adult Theater I* v. *Slaton*, 93 S.Ct. 2628 (slip opinion at pp. 6-7, esp. footnote 6 on p. 7).

VI.

The appellant's sixth assignment of error argues that the trial court erred in not dismissing the case at the end of appellant's case, where the State offered no evidence in chief, nor rebuttal evidence, as to the presence of the three elements required under *Roth-Memoirs* decisions, and of their coalescence therein. Since, as previously noted, the publications were themselves placed in evidence and were before the jury to consider, for the reasons noted in our disposition of assignment of error numbered five above, we find no error in the failure of the trial court to dismiss this cause at the conclusion of appellant's case. Accordingly, appellant's sixth assignment of error is overruled.

VII

Appellant's seventh assignment of error addresses itself to alleged error in the trial court's charge to the jury, namely, in refusing to give certain charges specifically requested, in erroneously charging on national community standards, on the elements of obscenity and scienter, and in refusing to respond properly to a question posed by the jury. A careful reading of the charge by the trial court convinces us that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibiities and duties as triers of the facts. Those charges specially requested by appellant and refused by the trial court were denied as either subsumed in the

general charge and therefore redundant, or as otherwise improper or misleading. We find no error prejudicial to appellant in their refusal, nor in the response by the trial court to the query of the jury. As to appellant's argument, contained in his Supplemental Brief, that the *Miller* decision fatally weakens any conviction not under the *Roth-Memoirs* test, we refer to our examination of this issue in appellant's third assignment of error.

Appellant's seventh assignment of error is overruled.

VIII.

Next, appellant argues that the "systematic exclusion" of young jurors from service on juries dealing with obscenity cases violated appellant's right to an impartial jury under the Sixth and Fourteenth Amendments of the Constitution of the United States. The record reveals that the customary procedure was followed in this case, of using a 1970 poll book to draw at random a venire of potential jurors. No suggestion is made, and none is present in the record, that any legal or constitutional irregularity exists with respect to venire so selected or to the method of selecting it, *except* to the extent that it necessarily excluded those under twenty-one years of age (twenty-three years at the time of trial in 1972) not then eligible to vote and therefore not included in the 1970 poll books. We find this procedure totally unlike the purposeful and systematic exclusion of racial groups held improper in *Swain* v. *Alabama*, 380 U.S. 202, and have been directed to no authority which would require us to hold otherwise. Indeed, the argument advanced by appellant invites a reductio ad absurdum rejoinder: If we must constitutionally include eighteen year olds to make up an impartial jury, why not sixteen year olds, who, after all, are permitted, under cer-

tain circumstances, to marry; or fourteen year olds who have achieved (or suffered) puberty; and if registered voters are incuded, why not citizens not so registered, including those imprisoned for crimes? It is obvious to us that some technically feasible method for selecting potential jurors reasonably calculated to secure and which does in fact secure a random unpremeditated sampling of citizens will, together with other protective procedures such as voir dire examination, peremptory challenges and challenges for cause, and the presence of an impartial magistrate instructing the jury on matters of law and procedure, satisfy the requirements of the Sixth and Fourteenth Amendments for an impartial jury, without the necessity of finding twelve persons precisely proportioned in age, sex, race, socioeconomic status, religion, etc. to their larger counterparts in society. Appellant's eighth assignment of error is without merit.

IX.

Appellant's ninth assignment of error asserts that the verdict is against the manifest weight of the evidence and is contrary to law. We have examined the record, including the publications in question, and have concluded that there is present in the record substantial credible evidence of probative value as to each element of the offense charged. Appellant's ninth assignment of error is accordingly overruled.

X.

Finally, appellant asserts by way of his tenth assignment of error, that the constitutional test formulated by the Supreme Court of the United States, incorporated into and applied by the State in the prosecution of this case (that is, *Memoirs* v. *Massachusetts*, 383 U.S. 413), was "com-

pletely and totally repudiated" by the Supreme Court in *Miller* v. *California,* 93 S.Ct. 2607, and that the retroactive application of the *Miller* test to sustain the instant judgment would offend the Fourteenth Amendment of the Constitution of the United States.

The point is not contested by the appellee, the State arguing that the retroactive application of *Miller* is not sought by the appellee and that the judgment against appellant should and can be sustained on the basis of existing law at the time of the convictions. This position impliedly argues that *Miller* did not so "completely and totally repudiate" the previous obscenity test *that any conviction secured thereunder* is necessarily infirm. We agree, for the reasons in our dispositon of appellant's third assignment of error. Accordingly, we overrule appellant's tenth assignment of error.

It is, therefore, the order of this Court, that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

HESS, P. J., SHANNON and PALMER, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

OPINION OF COURT OF APPEALS IN COMPANION CASE

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-72345

STATE OF OHIO,
Plaintiff-Appellee,

vs.

QUEEN CITY NEWS, INC.

and

JOHN MARSHALL,
Defendants-Appellants.

DECISION

(Dated January 14, 1974)

Per Curiam.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

Appellant, Queen City News, Inc., presents by way

of brief and supplement thereto, thirteen assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of appellant, Queen City News, Inc., and a jointly tried co-defendant, John Marshall, under Section 2905.35, Ohio Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material.

Appellant, John Marshall, presents by way of brief and supplement thereto, sixteen assignments of error.

These assignments of error will be considered below first in the order raised by appellant, Queen City News, Inc., and second in the order raised by appellant, John Marshall.

We note that this Court this day has decided State of Ohio v. Michael Kensinger, case number C-73008, unreported, wherein many of the issues raised are similar to those broached by the assignments of error in the instant case. Additionally, we note that counsel for Michael Kensinger, defendant-appellant, in case number C-73008, is the same counsel representing appellant, John Marshall, herein, and that counsel for appellant, Queen City News, Inc. is his associate.

Therefore, in diposing of some of the assignments of error asserted by the appellants in this case, reference will be made to our rulings in Kensinger, infra, where the reasons therefore apply to the assignments here before us.

Assignments of Error, Queen City News, Inc.:

I.

Queen City asserts that the statute upon which the indictment was based violates the First and Fourteenth Amendments to the United States Constitution.

This assignment is not well taken for the reasons set forth in our rulings upon the third and fourth assignments of error in Kensinger, supra.

II.

This assignment overlaps the first in that the contention is that the indictment failed to charge an offense punishable within the permissible limits of the First and Fourteenth Amendments to the United States Constitution. We find it not to be well taken for the reasons set forth in the disposition of the fourth assignment of error in *Kensinger*, supra.

III.

Appellant alleges that the trial court erred in overruling the pretiral motion to suppress evidence obtained in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

It is argued first in support of this assignment that special First Amendment principles apply which require a prior adversary hearing before seizure.

Despite the fact that some 1400 separate items, including books, magazines, film, phonograph records and rubber goods were seized and removed from a warehouse, there is nothing to show that more than one copy of a book, magazine or other item was taken by the police officers conducting the search. There is testimony that the warehouse contained from 100,000 to 200,000 items, there being numerous copies of each publication and duplications of the rubber goods. It is undisputed that the business of appellant was not shut down not interrupted for more than several hours.

In deciding *State* v. *Albini* (1972), 31 Ohio St. 2d 27, the court remarked at page 30 of the opinion:

> ". . . , we do not read the above cited Supreme Court decisions as demanding that in every case where a seizure of alleged obscene material is to be made, a preseizure adversary hearing is constitutionally required. Whether or not such a hearing is necessary must depend upon the nature and purpose of the seizure."

Just as in *Albini*, supra, the seizures now before us were not made for the purpose of preventing the dissemination of that which the various books, magazines, films and phonograph records contained nor preventing the sale of the rubber goods. Rather, the single samples were taken for the purpose of preserving them in order that they might be used as evidence in proceedings to determine whether their exhibitors were guilty of committing a crime.

Subsequent to the decision in *Albini*, the Supreme Court of the United States decided *Heller* v. *New York*, 93 S.Ct. 2789 (1973), the first headnote of which is:

> "There is no absolute First or Fourteenth Amendment right to a prior adversary hearing where allegedly obscene material is seized pursuant to warrant to preserve material as evidence in a criminal prosecution."

This squares with the syllabus in *Albini*:

> "Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidence to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

Consequently, as we noted in our ruling on the first assignment of error in Kensinger, the reasons impelling a prior adversary hearing in cases involving the seizure of presumptively constitutionally protected materials for destruction or other such purpose, as summarized in *Heller*, supra, *Roaden* v. *Kentucky*, 93 S.Ct. 2796, are simply not present in this case.

Appellant argues, further, that probable cause did not exist for the issuance of the search warrant; that the informant's reliability was not supported; that the facts failed to establish that a crime was being committed at the time the warrant issued; that the warrant failed to meet Fourth Amendment specificity requirements and failed to satisfy First and Fourth Amendment particularity requirements, and that the search conducted by the executing officers was a general search.

Fundamentally, it is required that the officer authorizing the search of premises be neutral and detached and that the information given him by an affiant be sufficient to enable him to make an independent judgment that probable cause exists to issue the warrant. *State* v. *Haynes* (1971), 25 Ohio St. 2d 264.

The standard of reasonableness for obtaining a search warrant has been set forth in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. Where the search warrant is issued pursuant to an informer's tip, the affidavit must: (i) set forth such of the underlying circumstances as may be necessary to enable the magistrate to judge the probable validity of the informant's conclusions; and (ii) some indication of the trustworthiness of the informant.

Here, the informant was a former employee of Queen City News, Inc. who knew what materials were stored in

the warehouse and who had delivered such as a route man serving customers. We believe that the "two pronged" test was met and that the affidavit is sufficiently detailed as to meet the requirements of law. Our examination of the record leads us to conclude that the tipster's information was not stale. The affiant had observed appellant conducting business, had received information about the character of that business and had verified by personal observation that at least one visible item was a publication which, in his opinion, was obscene. Such facts, coupled with the background afforded by the informant, clearly negate appellant's protests that there was nothing before the magistrate to establish probable cause that any crime was being committed.

It is equally apparent that where, as here, only single samples of a large inventory of many types of publications and other goods are seized to be used as evidence in a proceeding to follow and where, as here, such items have been identified with sufficient specificity and particularity in the warrant to search, such search is lawful and is not a general search.

Accordingly, we find the third assignment of error not to be well taken.

IV.

In this assignment, appellant asserts that the materials upon which the indictment was based were "protected expression under the First and Fourteenth Amendments to the United States Constitution" and that the prosecution totally failed to meet its burden of proof of obscenity.

It can no longer be gainsaid that obscene material is not speech entitled to First Amendment protection. *Paris*

Adult Theater I v. *Slaton,* 93 S.Ct. 2628; *Miller* v. *California,* 93 S.Ct. 2607; *United States* v. *Roth,* 354 U.S. 476.

In deciding *Slaton,* the court pointed out at pages six and seven of the opinion:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question."

Then, the record before us when viewed in the light of what we understand the law to be, clearly demonstrates that this assignment of error is without merit. See, also, the rulings upon the second and fifth assignments of error in Kensinger, supra.

V.

This assignment alleges that the prosecution failed to ruling the motion for acquittal upon the ground that the prosecution had failed to prove all of the essential elements of the offense charged.

The thrust of the argument advanced by appellant echoes that given in support of the fourth assignment.

We have examined the record, including the publications and materials in question, and are compelled to conclude that there is therein substantial credible evidence of probative value as to each element of the offense charged. Therefore, and for the reasons given above in our ruling on the fourth assignment, the fifth assignment is not well taken.

VI.

The sixth assignment reasserts the contention that the materials received into evidence are constitutionally protected. It is without merit for the reasons given in rulings upon the fourth assignment herein, and in our rulings upon the fifth and sixth assignments of error in Kensinger.

VII.

This assignment is that the trial court erred in overruling appellant's objections to admission into evidence of subpoenaed documents. It is urged that the subpoena *duces tecum* of corporate records consisting of personnel and payroll records and delivery sheets was (a) illegally issued; (b) invalidly served, and (c) that the records were erroneously received into evidence.

The State first attempted to serve an alleged statutory agent, but the agency was denied by the purported agent. Then, the State dropped a subpoena through the mail slot of the warehouse premises. Lastly, the State served an employee of the corporation on the loading dock of the warehouse.

Upon instruction of the court after conference with counsel, counsel for Queen City brought the records into court, but protested their production.

Although a number of cases are cited in support of branch (a) of the argument, with none of which do we disagree, we are not persuaded that corporation records cannot be subpoenaed in a criminal case. It must be remembered that the records were not seized but were sought to be produced by valid process.

Secondly, service upon the employee, under all the circumstances disclosed by the record, was sufficient.

The contention that the documents were erroneously received raises the essential question of protection afforded the corporate and individual defendants in the case by the Fifth Amendment to the Constitution of the United States.

In *Wilson* v. *United States*, 221 U.S. 361, it was observed:

> ". . . [the corporation] cannot resist production [of books and papers] upon the grounds of self-incrmination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment . . ., it must submit its books and papers to duly constituted authority when demand is suitably made."

The Ohio Supreme Court adopted this view and quoted extensively from *Wilson*, supra, in deciding *In re Bott*, 146 Ohio St. 511. At page 518 of the unanimous opinion in that case, we find:

> ". . . an officer of a corporation cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it."

This concept has been refreshed in *State* v. *Pussycat Cinex* (1973), 36 Ohio St. 2d 108, which cites *Wilson*, supra.

The privilege against self-crimination is then, not available to a corporation. Therefore, the seventh assignment of error is not well taken. Parenthetically, we note that this question as it pertains to the individual defendant-appellant will be discussed below.

VIII.

This assignment relates to the charge to the jury, the contention being that it violated the First and Fourteenth Amendments to the United States Constitution. Essentially, the arguments in support of this assignment parallel those advanced with reference to the seventh assignment of error in Kensinger. We find this assignment not to be well taken for the reasons given in our rulings upon the third and seventh assignments of error in Kensinger. Here, as in Kensinger, the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio Revised Code, and otherwise in its general duties and prerogatives.

IX.

Here, appellant claims that the court erred in limiting voire dire examination of the jury by defense counsel.

It is argued that rights accruing under the Fourteenth Amendment were denied because the court limited efforts of counsel to "probe the attitudes of prospective jurors" regarding, inter alia, "contemporary community standards of depiction of sexual material", "shifting views of frankness" and morality in depiction of sexual subject matter, "depth of feelings regarding obscenity of depiction", and attitudes about determining the dominant theme and redeeming social value of "sexually oriented" publications.

Examination of the jury upon voire dire begins at page 196 of the transcript of the proceedings and concludes at page 610. The initial impression we received upon our examination of this part of the record is that the judge presiding exhibited patience, restraint and stamina. He

permitted wide latitude to both defendants before the bar in their searching examination of prospective jurors. We find nothing to sustain their claim that the court abused its discretion or that strictures placed upon interrogation of the panel in ruling upon objections by the State prejudiced the accused.

The ninth assignment is not supported by the record and is not well taken.

X.

The tenth assignment is that the trial court erroneously denied defense counsel inspection of grand jury minutes.

The Supreme Court of Ohio recited the general rule to be applied when inspection of grand jury minutes is sought in its decision in *State* v. *Laskey*, 21 Ohio St. 2d 187, at page 191 of the per curiam opinion:

> "Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general."

The court referred in *Laskey* to the rule in *State* v. *White* (1968), 15 Ohio St. 2d 146, declaring that:

> "The *White* rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, cannot be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination."

See, also, *State* v. *Patterson*, (1971) 28 Ohio St. 2d 181, especially syllabus three.

In this case, appellant sought inspection of the minutes to "test the foundation upon which the indictment was grounded", arguing that "there is no unequivocal evidence in the record indicating that the grand jury returned the . . . indictment . . . upon a review of the 41 respective items supportive of the counts therein contained".

We do not discern from the record that the appellant has demonstrated the particularized needs required by the rule in *White* and *Laskey* and, consequently, are constrained to conclude that the assignment of error is not well taken.

Supplemental Assignments of Error:

XI.

Queen City urges herein that the affirmance of the conviction would violate due process and ex post facto prohibitions.

This assignment reflects the issues broached in the third and tenth assignments of error in Kensinger and is found not to be well taken for the reasons given therein.

XII.

Here, appellant claims again that the statutes under which it was charged are void for overbreadth or vagueness. It is not well taken for the reasons set forth in our ruling upon the first assignment of error herein and in the third and fourth assignments in Kensinger.

XIII.

The thirteenth assignment restates the issues raised by the third and fourth assignments of error herein and is not well taken for the reasons given therein.

Therefore, the judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, Queen City News, Inc. is affirmed.

Assignments of Error, John Marshall:

I.

In his first assignment of error, appellant, John Marshall, asserts that the search and seizure at the warehouse of Queen City News, Inc. was an unreasonable search and seizure.

While this assignment is prolix, we find that it raises the same, or very similar, issues brought before us in the third assignment of error in the appeal of Queen City News, Inc. Hence, we find this assignment of error by appellant, John Marshall, not to be well taken for the reasons given in our ruling hereinbefore on the third assignment of error of Queen City.

II.

This assignment is that the court erred in admitting publications into evidence where no evidence was presented establishing obscenity of the items.

The same question has been considered and ruled upon in Queen City's appeal with respect to the fourth and sixth assignments therein and in the appeal of Michael Kensinger with respect to the second and fifth assignments of error in that case.

Accordingly, this assignment is found to be without merit for the same reasons.

III.

The appellant asserts, here, that Sections 2905.34 and 2905.35, Ohio Revised Code, are unconstitutional and re-

pugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The same issue was raised by Queen City and Kensinger and this assignment by Marshall is held to be without merit for the reasons given in our rulings on the first assignment of Queen City and the third and fourth assignments of error by Kensinger.

IV.

Here, appellant questions whether the proof by the State demonstrated that the publications were not protected against State regulation by the First and Fourteenth Amendmens.

We have ruled on the same proposition in the first and second assignments of error by Queen City herein and in the third and fourth assignments in Kensinger. Therefore, the assignment of error by Marshall is not well taken for the same reasons.

V.

This assignment alleges that the prosecution failed to establish a prima facie case. It is not well taken for the reasons given above on the fourth and sixth assignments of Queen City and the second and fifth assignments in Kensinger.

VI.

Here, appellant urges that the court erred in not dismissing the cause at the conclusion of defendant's case, where the State offered no rebuttal evidence.

It is not well taken for the reasons given by us in disposing of the fifth and sixth assignments in Kensinger and the fourth and sixth assignments of Queen City herein.

VII.

The seventh assignment of error is identical in its essential thrust to the seventh assignment of error by Queen City is it relates to the admission of the corporate records of Queen City News, Inc.

A similar assignment numbered seven has been made by Queen City and ruled upon above as it pertains to that appellant, and to the degree that our rulings therein apply to Marshall, individually, they are adopted here.

When the entire transcript of the proceedings is considered, it is clear that it was never disputed that appellant, John Marshall, was connected with the operation of the business of Queen City News, Inc. He was at the warehouse when the warrant to search was executed and the seizure effected and had been there the day before. The essence of the defense was not that the accused did not possess the materials but they were not obscene and therefore protected.

We view the admission of the corporate records as being cumulative, at most, and are able to discern no ground upon which to determine that the appellant, Marshall, was prejudiced thereby, either by the records having been received in evidence or by the possibly contradictory remarks of the court to counsel. Hence, the assignment of error is without merit.

VIII.

This assignment challenges the instruction to the jury on the "national contemporary community standard", and appellant contends, inter alia, that the jury was misdirected on the issues of "dominant theme-prurient appeal" and "redeeming social value".

We find the eighth assignment of error not to be well taken for the reason that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases. For an expansion of this fundamental reason, attention it directed to our rulings in the seventh and third assignments in Kensinger and the eighth assignment in the appeal of Queen City.

IX.

This assignment asserts that the record establishes the bias of the trial court which denied defendant's right to effective counsel and to a fair and impartial trial.

We find the assignment not to be well taken because the record, considered in its totality, fails to support the assigned error in any of its particulars.

X.

The tenth assignment by Marshall is the same in its thrust and import as the tenth assignment by Queen City based upon denial of access to grand jury minutes and is without merit for the reasons given in our ruling in Queen City's appeal.

XI.

This assignment asserts that the court prejudiced Marshall in restricting inquiry to the venire. It is without merit for the reasons given in our rulings upon the ninth assignment in the appeal by Queen City.

XII.

Here, appellant contends that the court violated his rights granted by the Fifth and Fourteenth Amendments

to the Constitution of the United States by "commenting on the failure of the defendant to testify in his own behalf" during its instruction to the jury.

The court stated to the jury:

> "It is not necessary that a defendant take the witness stand in his or its own defense. He has a constitutional right not to testify. The fact that the defendant or defendants did not testify must not be considered for any purpose nor should any inference be drawn therefrom."

We believe the better practice to be for the court not to so instruct, but when the charge as a whole is considered the inclusion of the quoted language does not constitute prejudicial error.

Therefore, the assignment is not well taken.

XIII.

This assignment is, essentially, that Marshall was denied constitutional rights because the publications were not read to the jury and that since the jury "deliberated for a total of four hours and forty-six minutes" it follows necessarily that the jury could not have read and considered the materials submitted as evidence.

There is nothing in the record from which we could conclude that the jury was guilty of misconduct without indulging in improper speculation. There is nothing to demonstrate how the jury reached the verdict and it must be presumed that the result was reached in harmony with the instructions of the court and according to law. The general rule to be applied is that no judgments of conviction will be reversed unless it appears affirmatively from the record that the accused was prejudiced. We find no such affirmative demonstration and must conclude that the assignment is not well taken.

XIV.

The ground of this assignment of error has been disposed of in our ruling on the eighth assignment of error in Kensinger and the reasons there given are adopted here.

XV.

Here, Marshall asserts that the verdict is manifestly against the weight of the evidence and contrary to law.

We have examined the record, including the publications and materials in question, and have concluded that there is present in the record substantial evidence of probative value as to each element of the crime charged. Accordingly, the assignment is not well taken.

XVI. (Supplemental)

The assignment of error is that the constitutional test (*Memoirs*) has been "completely and totally repudiated" in *Miller* v. *California*, 93 S.Ct. 2607. It is not well taken for the reasons given in the disposition of the third and tenth assignments in Kensinger and adopted in the eleventh assignment in the appeal of Queen City.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, John Marshall, is affirmed.

HESS, P. J., SHANNON and PALMER, J.J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

Relevant Provisions of Ohio Revised Code

[Former] O.R.C. 2905.34

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts, of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars, or imprisoned not less than one nor more than seven years, or both."

§ 2905.34 Definitions.

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educationa, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture fim, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

§ 2905.35 [Production or dissemination of obscene material or performances.]

No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both.

APPENDIX C

APPELLEE'S BRIEF

IN THE SUPREME COURT OF OHIO
1972

Case No. 72-145

STATE OF OHIO
Plaintiff-Appellee

vs.

RICHARD A. BLAIR
Defendant-Appellant

STATEMENT OF FACTS

Defendant-appellant, Richard A. Blair, was indicted on six counts of selling obscene literature, violative of Section 2905.34, Revised Code of Ohio. He was tried on four of these (counts 2, 4, 5 and 6), and found guilty by jury on June 11, 1971.

At trial the State presented evidence in the form of testimony by Officers Pennington and Lombard of the Columbus Police Vice Squad which established that on April 21, 1970, the officers separately entered the premises owned by Mr. Blair called "The Stag Book Store," and after looking over the materials on open display in the store, obtained two magazines each. A ten dollar bill was given in exchange for the materials taken * * *

* * *

APPELLANT'S BRIEF

State v. *Blair*, #72-145 Supreme Court of Ohio

STATEMENT OF FACT

In June of 1971, Richard A. Blair was brought to trial on four counts of a six count indictment setting forth violations of Ohio Revised Code Section 2905.34 (as it existed prior to September, 1970).

At the trial of this cause, the Prosecutor nolle prosequi the first and third counts of the indictment.

Count #2 of the indictment charged that on April 21, 1970, Defendant-Appellant sold an obscene magazine ("Ram").

Count #4 of the indictment charged that on April 21, 1970, the Defendant-Appellant possessed an obscene magazine, with intent to sell, ("Male & Female Nudes"). This magazine was seized by a Columbus police office, without a search warrant.

Count #5 of the indictment charged that on April 21, 1970, Defendant-Appellant possessed an obscene magazine, with intent to sell ("Girlfriend — Vol. #1"). This magazine was seized by a Columbus police officer, without a search warrant.

Count #6 of the indictment charged that on April 28, 1970, Defendant-Appellant possessed an obscene magazine, with intent to sell ("Ram"). This magazine was seized by a Columbus police officer, without a search warrant.

A trial was had before a jury, which returned a verdict of guilty on June 11, 1971 on all four counts.

On June 14, 1971, a Motion for a New Trial was filed charging irregularity in the proceedings, improper orders of the Court, abuse • • •

• • •

* * * County held that an adversary hearing was needed before a search warrant could issue and stated that:

> ". . . there must be full compliance with the procedural safeguards as established by the Supreme Court of the United States that will constitutionally protect the right of free speech and expression and that will prevent any prior restraint before the question of obscenity can be resolved in a full adversary proceeding." (21 Ohio Misc. at Page 195)

In *Goodwin* v. *Morris, Mayor, et al.*, 23 Ohio Misc. 331, decided March 18, 1970, the Court held that:

> "Any allegedly obscene materials seized in connection with state arrests and prosecutions which did not involve a preliminary adversary determination of their obscenity will be suppressed as evidence in such pending prosecutions, in an action for declaratory judgment in a federal district court."

On February 19, 1970, Judge Battisti of the United States District Court for the Northern District of Ohio, Eastern Division, in *Hercules Productions, Inc.* v. *John T. Corrigan, et al.*, Case No. C 70-125, following *A Quantity of Books* v. *Kansas*, supra, as well as a number of other cases, stated:

> "The First Amendment prohibits the imposition of prior restraint upon the distribution of forms of expression without first conducting an adversary hearing."

The Court in that case went on to require the return of the film illegally seized without such a hearing.

The inescapable conclusion is that a prior adversary proceeding is necessary before there can be a seizure of allegedly obscene books.

No prior hearing having been held, and not even a search warrant having been used to obtain the evidence, the verdicts based upon Counts Four, Five and Six must be set aside, and the evidence suppressed * * * (Emphasis added)

JAN 10 19
MICHAEL RODAK, JR.,

Supreme Court of the United States

No. 74-226

October Term, 1974

MICHAEL KENSINGER,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
Cleveland, Ohio 44113
Counsel for Appellant-Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its dismissal of appeal, entered on December 16, 1974, and (2) noting probable jurisdiction, or issuing a writ of *certiorari* in the event the Court declines to note probable jurisdiction of the appeal. As grounds for this motion, petitioner states the following:

1. The Order of the Supreme Court of December 16, 1974, Dismissed the Instant Appeal.

On December 16, 1974, this Court, four justices dissenting, dismissed the appeal of petitioner for want of a substantial federal question. The instant appeal is based upon the invalidity of Ohio's obscenity law under which

petitioner was tried and convicted. Petitioner also urges in the instant appeal that other denials of his constitutional rights compel this Court's issuance of a writ of *certiorari*.

Simultaneously with its order dismissing the appeal, the Court vacated the previous order of Justice Stewart staying the execution and enforcement of the judgments of the Supreme Court of Ohio and of the sentence of petitioner. 43 U.S.L.W. 3348 (December 17, 1974). Petitioner was sentenced to two years probation and a total fine of $500.00.

The dismissal of the appeal constitutes an affirmance on the merits of the state court decisions upholding the validity of the statutes involved; but the dismissal does not constitute a decision on the merits of the other issues presented. See *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

Justices Brennan, Stewart, Marshall and Douglas dissented from the dismissal of the appeal, and stated that they would note probable jurisdiction and would reverse the state court decisions. Justices Brennan, Stewart and Marshall specifically noted that they did not consider whether the other questions presented in addition to petitioner's challenge to the overbreadth of Ohio's obscenity laws merit plenary review.

Petitioner urges this Court to grant rehearing of its dismissal of the appeal and to order plenary consideration of (A) the substantial federal questions presented on appeal challenging the validity of Ohio's obscenity law, and (B) the substantial federal questions presented as on petition for writ of *certiorari* challenging other denials of well-established constitutional rights.

2. The Questions Presented on Appeal Warrant Plenary Consideration.

A petition for rehearing of decisions, other than those denying or granting *certiorari*, will be granted only at the instance of a justice who concurred in such decision, and upon the concurrence of a majority of the Court. Rules of the Supreme Court of the United States, Rule 58(1); *Reid v. Covert*, 354 U.S. 1, 65-67 (1957) (Harlan, J., concurring).

By the margin of a single vote and in the absence of plenary consideration, this Court has upheld in the instant cause the validity of Ohio's statutory attempt to suppress sexually oriented materials on the basis of their alleged obscene contents. Thus the Court has rejected petitioner's urgings that as a result of such affirmance, persons of Ohio are subject to conviction, fine and imprisonment for the distribution of material constitutionally protected under the pronouncements of this Court. For, Ohio's obscenity law, on its face and as construed by the Supreme Court of Ohio, fails to require that the material be patently offensive, fails to require proof that the material lack the requisite value, and fails to accurately require that the material, *taken as a whole*, appeal to a prurient interest. Jurisdictional Statement, p. 7.

Petitioner submits that the difficult issues presented, and which have sharply divided this Court, warrant plenary consideration with the fullest opportunity for each justice to evaluate the arguments and to formulate his views. Plenary consideration is especially compelling since similar challenges to the validity of Ohio's obscenity law are currently before this Court in *State ex rel. Sensenbrenner v. Adult Bookstore*, 35 Ohio St. 2d 220 (1973), *petition for cert. filed*, 42 U.S.L.W. 3388 (U.S. Dec. 24, 1973) (No. 73-982), and *Art Theater Guild, Inc. v. State of Ohio*

ex rel., Clark L. Ewing, 37 Ohio St. 2d 95 (1974), *appeal filed*, 43 U.S.L.W. 3125 3125 (U.S. Sept. 10, 1974) (No 73-1973).

Petitioner urges each justice to reconsider the issues presented and to vote for rehearing and the noting of probable jurisdiction.

3. The Questions Presented as on Petition for Writ of Certiorari Warrant Plenary Consideration.

A petition for rehearing of orders on petition for writ of *certiorari* will be granted if the petition presents intervening circumstances, of substantial or controlling effect. Rules of the Supreme Court of the United States, Rule 58 (2).

The other issues presented by petitioner in addition to his challenge to the validity of Ohio's obscenity law are properly before and reviewable by this Court. See *Flournoy v. Weiner*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

However, Justices Brennan, Stewart and Marshall specifically noted their failure to consider the other issues presented (Brennan, J., dissenting). And it appears that Justice Douglas also did not consider such issues (Douglas, J., dissenting). Furthermore, the order dismissing the appeal does not disclose how the justices who joined in the order for dismissal voted on the granting of review based upon such issues.

In support of their failure to consider the other issues presented, Justices Brennan, Stewart and Marshall relied upon Justice Brennan's dissent in *Heller v. New York*, 413 U.S. 495 (1974). But the decision of these three Justices to consider only the validity of the state obscenity law in *Heller* is inapplicable to the instant case. For in *Heller*, a

majority of the Court, upon plenary consideration of the issues unrelated to the validity of New York's obscenity law, decided the case adversely to petitioner's contentions. Thus, the decision of the Court in *Heller* could not have been altered by the positions of Justices Brennan, Stewart and Marshall on different grounds, and their failure to consider these issues had no effect upon the outcome.

However, in the instant case, consideration by the three Justices of issues not previously considered by them *could* easily affect the Court's issuance of a writ of *certiorari*. For the Court may grant review upon the affirmative vote of a substantive minority of the justices. *See Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, n.2 (1959) (Douglas, J., concurring); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring). And as above noted, under the current order of the Court, at least four justices have not voted on whether to grant a writ of *certiorari* in the instant case.

Thus, petitioners submit that the question of whether the other issues presented warrant plenary consideration remains undecided and compels rehearing. *Cf. Silver King Coalition Mines Company v. Conkling Mining Company*, 256 U.S. 18, 25 (1921).

The failure of each justice to vote on each issue is an adjudicatory procedure as disturbing in its implications as the substantial constitutional issues herein presented. For, each justice, unless he disqualifies himself in a particular case, is to pass upon every piece of business coming to the Court. Mr. Justice Brennan: *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 400-406 (1960); U.S. Const. Art. III, §1. Furthermore, the failure of the entire Court to consider all the issues is a practice which renders unworkable the Court's rule of granting review upon the affirmative vote of a substantial minority of the justices.

Petitioner urges that the Court, upon rehearing, grant plenary review. For, if the state court decisions stand as the law of Ohio, the people of Ohio will be denied well established constitutional rights in the following areas of the law:

The Law of Search and Seizure. Law enforcement officers can halt the orderly distribution of materials and avoid the necessity of a prior judicial determination of their obscenity: (1) The officers can *seize the person* involved in such distribution rather than the material; and (2) The officers can use governmental dollars to "make buys" of material in furtherance of a planned governmental effort to support criminal prosecutions.

If the Court does not grant review, the State of Ohio will be able to do in substance what this Court stated a government could not do: halt the distribution of material without a judicial determination of the obscenity of the material. If the Court now intends to limit its holding in *Roaden v. Kentucky*, 413 U.S. 496 (1973), it should do so only upon plenary consideration.

Pre-Trial procedures of identification of the accused. A witness to alleged criminal conduct who is also a policeman, can make at a time subsequent to an accused's indictment, a pre-trial, out-of-court identification of the accused in the absence of his counsel and under unnecessarily suggestive circumstances conducive to mistaken identification. If the Court does not grant review, law enforcement officers will be above the law as to constitutional requirements of pre-trial, out-of-court identification procedures. If the Court now intends to limit its holdings in *Kirby v. Illinois*, 406 U.S. 682 (1972) or *Neil v. Biggers*, 409 U.S. 188 (1972) it should do so only upon plenary consideration.

Proof of scienter as an element of the crime charged. Convictions will be obtained, as in the instant case, without proof that the defendant had knowledge of the character and content of the materials at issue, or had any illegal intent as to the use of such materials. If the Court now intends to overrule its holding in *Smith v. California*, 361 U.S. 147 (1959), it should do so only upon plenary consideration.

Jury instructions in obscenity cases. The trier of fact will judge the presence of obscenity based upon what is fit for a child to read. If the Court now intends to limit its decision in *Butler v. Michigan*, 352 U.S. 380 (1957), it should do so only upon plenary consideration of the issue.

This Court should not summarily dismiss the foregoing claims of substantial denials of constitutional rights. Petitioner urges this Court to continue its invariable practice of long duration and to grant plenary review of the foregoing issues upon the affirmative vote of four or more justices. *See Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15 (1959) (Douglas, J., concurring); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959).

The "rule of four" is a safeguard, self-imposed by the Court, to prevent unduly limiting access to the Court; if a substantial minority of the justices determine that a case presents questions that are review-worthy, the case warrants plenary consideration. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring); *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, n.3 (1959) (Douglas, J., concurring).

CONCLUSION

For the reasons set forth above and in his jurisdictional statement, petitioner urges this Court to grant rehearing and, upon such rehearing, to note probable jurisdiction, or to issue a writ of *certiorari* in the event the Court declines to note probable jurisdiction of the appeal.

BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
781-5245
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

BERNARD A. BERKMAN
Counsel for Petitioner